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No. ____

In the Supreme Court of the United States

ROBERT SHOWLER and JOHNNY DAVIDSON,
Individually and as Special Administrator of the
Estate of Kyle Adam Brinlee,
Petitioners,

v.

HARPER'S MAGAZINE FOUNDATION,
PETER TURNLEY, Individually and in his Capacity
as a Contributing Editor to Harper's Magazine,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a private citizen have a common law right to privacy with respect to funeral services and death images of a family member in accordance with *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004)?

2. Does a private citizen have the right to place restrictions upon the media in attendance at a funeral?

3. Is the funeral of a private citizen transformed into a "public" event based upon the location of the funeral and the number of persons in attendance, thereby eliminating all expectation of privacy?

4. Do the decisions of the United States District Court for the Eastern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit conflict with the decisions from this Court regarding the appropriate standards for granting summary judgment?

PARTIES TO THE PROCEEDING

Robert Showler
Johnny Davidson, Individually and as Special Administrator of the Estate of Kyle Adam Brinlee
Harper's Magazine Foundation
Peter Turnley, Individually and in his Capacity as a Contributing Editor to Harper's Magazine

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Petitioners, Robert Showler and Johnny Davidson, respectfully pray that a writ of certiorari issue to review the opinion and decision of the United States Court of Appeals for the Tenth Circuit issued on March 23, 2007.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not a published decision, but the Westlaw citation is available at 2007 WL 867188, 35 Media L. Rep. 1577 (10th Cir. 2007). The unpublished decision is included in the Appendix ("App.") hereto.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on March 23, 2007. Jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988) and 28 U.S.C. § 1332 (1996).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment, United States Constitution, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*,

410 U.S. 113, 152, 93 S.Ct. 705, 726 (1973). "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." *Id. See also Carey v. Population Services International*, 431 U.S. 678, 684-5, 97 S.Ct. 2010, 2016 (1977).

STATEMENT OF THE CASE

This Court, in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004), recognized that family members have a deeply rooted common law right to privacy in the control of the body and death images of their loved ones. This case involves a magazine photographer who took photographs of Plaintiffs' decedent in his open casket despite being specifically instructed not to do so. The District Court decided the First Amendment protected the unauthorized conduct and the 10th Circuit Court of Appeals held there was no right of privacy considering the public nature of the funeral. Both decisions were erroneous and this Court should grant certiorari to correct the lower courts' rejection of *Favish*.

A. Preliminary Statement

On December 30, 2005, the District Court for the Eastern District of Oklahoma granted summary judgment in favor of Harper's Magazine Foundation ("Harper's") and Peter Turnley ("Turnley") (jointly "Respondents") in a lawsuit filed by the surviving family of Sergeant Kyle Brinlee [Showler][1]

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[1] Kyle Brinlee was born as Kyle Showler on February 17, 1983. Kyle's name was changed to Brinlee in an adoption proceeding. In

("Kyle"). The Amended Complaint filed on June 14, 2005 asserted the following claims: Count I, Intentional Infliction of Emotional Distress; Count II, Invasion of Privacy; Count III, Violation of 21 O.S. § 839.1; Count IV, Fraudulent/False Misrepresentation; Count V, Constructive Fraud, Fraud and Deceit; Count VI, Unjust Enrichment; Count VII, Negligent Hiring, Retention, and Supervision. Plaintiffs appealed to the Tenth Circuit Court of Appeals on December 30, 2005. The Tenth Circuit affirmed the ruling of the United States District Court for the Eastern District of Oklahoma on March 23, 2007. (App. 3a).

B. Statement of the Facts

Sergeant[2] Kyle Adam Brinlee, 90th Troop Command, Oklahoma Army National Guard, was killed in action in Iraq on May 11, 2004, when an IED exploded near his vehicle. (App. 46a). Robert Showler, Kyle's biological father, and Johnny Davidson, Kyle's Grandfather and Personal Representative, hired Stephens Memorial Chapel in Pryor, Oklahoma, to coordinate the funeral and carry out the family's wishes so the family could grieve without being burdened by funeral arrangements. (App. 197a). On May 13, 2004, Showler, Davidson, and other family members met with Rick Stephens ("Stephens") of the Stephens Memorial Chapel to plan the funeral. (App. 197a). Showler and Davidson told Stephens that they did not want anyone taking pictures of Kyle's open casket, and that they did not want to

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the last few years of Kyle's life, Kyle often referred to himself as Kyle Showler.

[2] Kyle was promoted posthumously from Specialist to Sergeant.

be bothered by members of the media. (App. 197a). Stephens agreed to enforce these restrictions.

Peter Turnley was a photographer and contributing editor for *Harper's Magazine*. In this capacity, Turnley decided to prepare a pictorial essay of the impact the War on Terrorism was having on the families of soldiers and others killed-in-action. To do so, Turnley traveled to several funerals of soldiers around the country to take photographs. While attending a funeral in Texas, Turnley learned of Kyle's funeral and began making plans to attend. Turnley made at least three telephone calls to the Stephens Memorial Chapel to obtain permission to attend Kyle's funeral. (App. 197a). Turnley had already obtained photographs of other grieving families for the photographic essay Harper's planned to publish.[3] During one telephone call to Stephens, Turnley introduced himself to Mr. Stephens as Harper's photographer and requested permission to attend Kyle's funeral. (App. 24a, 133a). Mr. Stephens gave Turnley conditional permission to attend, provided Turnley complied with the three restrictions Stephens was placing on all members of the press who desired to attend. These restrictions were (1) Turnley was not to approach or contact the family during the funeral service, (2) Turnley was to remain in a section reserved for the press, and (3) Turnley could not take photographs of the open casket. (App. 24a, 133a-134a). Mr. Stephens testified that Turnley acknowledged and agreed to these restrictions. (App. 130a, 157a). Nevertheless, Turnley now denies that he was told not to photograph Kyle's open casket, (App. 130a) though he admits that he was given and agreed to abide by the other two restrictions. (App. 133a-134a). It goes without saying that no

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[3] This essay became *The Bereaved* and is the subject of this lawsuit.

other member of the press took open casket photographs of Kyle.

Kyle's funeral was held on May 19, 2004, at the Pryor High School Auditorium.[4] (App. 4a, 134a). Stephens spoke with Turnley again on the day of the funeral. (App. 134a). To control the media and carry out the family's wishes, Stephens designated an area for the press, including Turnley, at the back of the auditorium. (App. 133a-134a, 198a). Despite the restrictions imposed by Kyle's family, conveyed and agreed to by Turnley, Turnley took multiple photographs of Kyle in his open casket. (App. 134a-135a, 198a). Turnley even left the area prescribed by the family for the press and took photographs of Kyle's open casket from the sound and lighting control booth by sitting on a counter and leaning through the opening in the sound booth. (App. 133a,-134a, 198a). Finally, Turnley even introduced himself to Showler at the grave site despite his earlier agreement. (App. 134a). While speaking with Showler, Turnley offered to send Showler the photographs he had taken, but Turnley did not disclose to Showler that he had taken approximately ten photographs of Kyle's open casket. (App. 135a).

Harper's and Turnley published a photograph of Kyle's open casket in its August 2004 edition with the caption, "The casket of SPC. Brinlee at funeral services in a high school auditorium in Pryor, Oklahoma." (App. 135a). Though Respondents argue that the presence of Oklahoma's Governor in the photograph is significant to this case, there is nothing within the photograph or its caption that identifies Governor

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[4] Anticipating numerous family and friends at the funeral to mourn, Stephens obtained permission for the funeral to be in the Pryor High School auditorium.

Henry. (App. 135a). It is undisputed that Respondents never obtained permission to publish an open casket photograph of Kyle at any time, including for the August 2004 issue of *Harper's Magazine*. Turnley never told Showler that he intended to mail Showler numerous photographs of Kyle's open casket. (App. 135a). Showler first learned that Turnley had taken multiple open casket photographs when copies of the photographs arrived in the mail at his residence. (App. 5a). On August 7, 2004, Courtney Neal, Kyle's aunt, emailed Harper's and Turnley setting forth her vehement objections to the photograph of Kyle's open casket that they published. (App. 135a).

Despite knowing the objections that Kyle's family held concerning the open casket photographs and the publication of one of those photographs, Harper's and Turnley continued to promote their essay containing the open casket photograph by conducting numerous interviews with both local and international news agencies, appearing on multiple television programs, and entering the photograph in numerous competitions. (App. 132a). Respondents even had the audacity to sell the photographic essay with the photograph of Kyle's open casket to a French magazine, *Le Monde 2,* wherein it was subsequently published in France. Consequently, Mr. Showler, Mr. Davidson and Kyle's family have been damaged by Respondents' conduct.

REASONS FOR GRANTING THE PETITION

In *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004), this Court recognized that a private citizen has a common law right to privacy with respect to funeral services and death images of a family member. The United States Congress, the legislatures of several States, and the United States District Court for the

Northern District of Ohio have recognized this same common law right to privacy by enacting and upholding laws preventing picketing and/or protesting in the area surrounding funerals. However, the United States District Court for the Eastern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit improperly construed *Favish* to provide this right to privacy exclusively in cases arising from Freedom of Information Act requests, and concluded that *Favish* was inapplicable to Petitioners.

Private citizens have the right to place restrictions on the media attending a funeral. Indeed, restrictions on the media in this setting demonstrate the family's intent to reserve an expectation of privacy, not waive it. A funeral is not transformed into an unprotected "public event" based upon its location and the number of persons in attendance. Otherwise, undue constraints are placed on a grieving family.

The decision appealed is also in conflict with the decisions from this Court regarding the appropriate standards for granting summary judgment. The District Court improperly weighed the credibility of the evidence presented, improperly made findings of fact that were not supported by the record, improperly resolved disputed issues of fact in favor of the movant, and improperly considered the facts and inferences in a light most favorable to the movant. The Tenth Circuit improperly relied upon the District Court's findings of fact, improperly resolved disputed issues of fact in favor of the movant, and improperly considered the facts and inferences in a light most favorable to the movant. Finally, this Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254 (1988).

I. PRIVATE CITIZENS HAVE AN OVERARCHING RIGHT TO PRIVACY IN A FUNERAL SETTING.

This Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 726 (1973). "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." *Id.* *See also Carey v. Population Services International*, 431 U.S. 678, 684-5, 97 S.Ct. 2010, 2016 (1977); *Aid for Women v. Foulston*, 441 F.3d 1101, 1116 (10th Cir. 2006) ("While the Constitution does not explicitly establish a right of privacy, the Supreme Court has recognized for nearly 100 years that a right of personal privacy does exist.") The United States Court of Appeals for the Tenth Circuit has held that:

> With respect to the question of when an individual has a legitimate expectation that information will remain confidential, we have held that an individual's expectation of privacy for constitutional purposes is legitimate only if the information is highly personal or intimate.

Livsey v. Salt Lake County, 275 F.3d 952, 956 (10th Cir. 2001).

The Tenth Circuit has recognized that there are two distinct types of information protected by the right of personal privacy:

> This right protects two kinds of privacy interests: the individual's interest in avoiding disclosure of personal

> matters and the interest in being independent when making certain kinds of personal decisions.... An individual is thus protected from disclosure of information where the individual has a legitimate expectation ... that it will remain confidential.

Aid for Women v. Foulston, 441 F.3d 1101, 1116 (10th Cir. 2006). *See also Hill v. National Collegiate Athletic Assoc.*, 7 Cal 4th 1, 35, 865 P.2d 633, 654 (1994). The Supreme Court of California in *Hill, supra.* held:

> A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity. Such norms create a threshold reasonable expectation of privacy in the data at issue.... Whether established social norms safeguard a particular type of information or protect a specific personal decision from public or private intervention is to be determined from the usual sources of positive law governing the right to privacy - common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative.... In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.... A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms.

Id. at 35-37, 654-655. Petitioners contend that they, along with all private citizens have a reasonable expectation of privacy regarding the funeral services and death images of loved ones.

An individual's right to privacy to control and restrict both the funeral and death images of a deceased family member is deep-seated in civilized society and is the fundamental principle upon which Petitioner's claims are based. This Court, in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004), recognized the common law right of privacy held by family members in controlling funerals and death images of their deceased loved ones:

> We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes. . . . Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rights and respect they seek to accord to the deceased person who was once their own. In addition this well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law. Indeed, this right to privacy has much deeper roots in the common law than the rap sheets held to be protected from disclosure in *Reporters Committee*. . . . We can assume Congress legislated against this background of law, scholarship, and history, when it enacted FOIA and when it amended Exemption 7(C) to extend its terms.

Favish, 541 U.S. at 167-69, 124 S.Ct. 1570, 1578-79 (2004). In the challenged decision, the Tenth Circuit concluded that *Favish* "is inapplicable" to Petitioners' privacy claims because

it relies on a statutory privacy right under the Freedom Of Information Act. (App. 10a). To the contrary, *Favish* explained that Congress' use of the term "personal privacy" in the FOIA was "intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions." *Favish*, 541 U.S. at 137, 124 S.Ct. 1570, 1578 (2004). The Tenth Circuit's analysis of *Favish* is too narrow. This Court did not suggest that the common law right to privacy as to a family's control over body and death images is limited to Freedom of Information Act requests. Furthermore, the Tenth Circuit's reasoning that *Favish* only protects "gruesome" death-scene photos and not images at a funeral is an overly restrictive interpretation. (App. 11a).

In fact, the United States District Court for the Northern District of Ohio recognized that the privacy rights set forth in *Favish* protect a family's right to privacy in holding a funeral. *Phelps-Roper v. Taft*, 2007 WL 915109, *5 (N.D. Ohio 2007). The Northern District of Ohio was called upon to determine the constitutionality of Ohio's statute regarding "Picketing or protesting during funeral services." OHIO REV. CODE ANN. § 367.30 (2006). In upholding Ohio's statute, the Court relied upon both *Favish* and a decision from the United States District Court for the Eastern District of Kentucky that upheld Kentucky's statute prohibiting picketing and protesting at funerals, which stated:

> A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive. If they want to take part in an

> event memorializing the deceased, they must go to the place designated for the memorial event.

Phelps-Roper, supra., 2007 WL 915109 at *5 *citing McQueary v. Stumbo*, 453 F.Supp.2d 975, 992 (E.D. Ky. 2006). The *McQueary* court further held that:

> Thus, while a state cannot protect citizens from communications solely because the citizens may find the communications offensive, a state may protect citizens from unwelcome communications – including offensive communications – where the communications invade the privacy interests in an essentially intolerable manner, as where the communications are directed at citizens in their homes or where the communications are directed at a 'captive' audience and are so obtrusive that individuals cannot avoid exposure to them.

McQueary, supra., 453 F.Supp.2d at 989.

This Court has recognized that the family of a deceased person has a deeply rooted common law right to control the death images of their deceased loved one. *See Favish, supra.* A family's personal right to privacy regarding funerals and memorial services is now being recognized by the federal and states legislatures. To protect the privacy of family members charged with the painful task of burying a family member, including families of military personnel killed in action in Iraq and Afghanistan, the federal government and several states,[5]

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[5] In 2006, the United States Legislature passed the Respect for America's Fallen Heroes Act, which prohibits demonstrations at certain cemeteries. 38 U.S.C. § 2413 (2006). The following states

including Oklahoma, have enacted specific legislation to prevent picketing or protesting at funerals. The Oklahoma Statute states:

> (1) The Legislature finds that:
>
> (a) it is generally recognized that families have a substantial interest in organizing and attending funerals for deceased relatives...."

OKLA. STAT. tit. 21, § 1380(A)(1)(a) (2006). The Oklahoma Legislature further recognizes that one of the purposes behind enacting the Oklahoma Funeral Picketing Act is to "Protect the privacy of grieving families...."

Petitioners Robert Showler and Johnny Davidson had a "substantial interest" in honoring the life and service of their fallen son and grandson, and the privacy rights of Kyle's family should be recognized, protected and enforced. Petitioners' right to privacy is in no way diminished simply because large numbers of people, including the Governor of Oklahoma, chose to pay their respects at Kyle's funeral. If, as the Tenth Circuit and District Court have suggested, the number of attendees at a funeral alone will destroy a family's right to privacy, then no military family can expect any privacy with regards to the funeral or memorial services for its fallen soldiers, in part due to the number of military veterans attending the funerals of those killed in Afghanistan

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have enacted legislation to prohibit picketing/protesting at funerals: Arkansas, Colorado, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, South Dakota, Tennessee, Texas, Vermont, Virginia, Wisconsin and Wyoming.

and Iraq. Likewise, under the District Court and Tenth Circuit's rationale, a family with many friends, relatives and co-workers do not have an expectation of privacy simply due to the number of individuals who may wish to pay their final respects.

Petitioners had a reasonable expectation that Kyle's funeral service would remain private, despite the attendance of the media. Petitioners specifically placed restrictions upon and exercised control over the media in attendance to ensure the family's privacy would remain intact. Private citizens should not, as the Tenth Circuit suggests, have to post "signs limiting the photographers' permission" at funeral and memorial services in order to ensure that photographs of their deceased loved ones will not wind up in the media. (App. 19a). Any reasonable person would consider open casket photographs taken during a funeral service, without the permission of the family, to constitute an "unwarranted public exploitation" of privacy. Petitioners' right to privacy was first violated when Turnley photographed Kyle's open casket, against the explicit instructions of the Petitioners. Turnley and Harper's further invaded Petitioners' privacy by publishing the open casket photograph of Kyle. Petitioners simply request that such invasions of their privacy be recognized and enforced. Therefore, this Court should grant certiorari to instruct lower courts on the existence of a common law right to privacy, as recognized in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004).

II. PRIVATE CITIZENS HAVE THE RIGHT TO CONTROL THE FUNERAL OR MEMORIAL SERVICES OF FAMILY MEMBERS.

Oklahoma has recognized the right and duty of family members to direct and control disposition of the body of the

deceased in Oklahoma Statute title 21, § 1158 (1997) and *Brady v. Criswell Funeral Home, Inc.*, 916 P.2d 269 (Okla. Civ. App. 1996). In *Brady*, the Court of Appeals reviewed whether a funeral home could be negligent in proceeding with the cremation of a deceased person over the objection of one of the family members. The funeral home's knowledge of a disagreement between the children of the deceased precluded awarding the funeral home summary judgment, because:

> Such knowledge of disagreement between next of kin with equal authority to dispose of the bodily remains overrides Appellant's brother's representation that he had the authority to determine the disposition of the body. Sufficient facts exist creating at least a question of fact as to whether Appellee funeral home did what it reasonably should have done.

Id. at 271. *Brady* recognized that each family member had the right to control the disposition of the deceased's body, and the funeral home had a duty to respect the same.

Petitioners had a duty pursuant to OKLA. STAT. tit. 21, § 1158 (1997) to bury Kyle and had an absolute right to control every aspect of Kyle's funeral. Petitioners exercised their rights to control Kyle's funeral service by allowing the media to attend under limited circumstances. Petitioners specifically instructed Stephens that the media was not to approach the family, the media must be restricted to a specific area during the funeral service, and Petitioners demanded that Stephens prohibit the media from taking photographs of Kyle's open casket. Stephens testified that, as an agent of Petitioners, he notified Turnley of Petitioners' restrictions, in particular the restraint on photographing Kyle's open casket. Therefore, this Court should grant certiorari to instruct lower courts on the existence of a common law right to privacy, as

recognized in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004).

III. THE FUNERAL OR MEMORIAL SERVICE OF A PRIVATE CITIZEN IS NOT A "PUBLIC" EVENT.

The District Court and the Tenth Circuit held that Petitioners had no right to privacy in Kyle's funeral as the service was a public event, due to the number of attendees, the location of the funeral, and the fact that the funeral arrangements were published in a local newspaper prior to the service. Since the Petitioners "opened up the funeral scene to the public eye," the Court reasoned, they "can not, therefore, establish that Defendants disclosed private facts by publishing the Turnley Photo." (App. 15a). Petitioners agree there was local public interest in honoring Kyle, but the number of people who were permitted to attend the funeral did not eliminate their reasonable expectation of privacy as to photographic images of the open casket.

The Tenth Circuit opinion wrongly concludes that Petitioners could not place reasonable restrictions on photography to preserve their right of privacy since the funeral was "open to the public eye." Neither was the high school gymnasium a public forum that would eliminate all privacy interests. The number of people present is not relevant in a determination of whether a property is a public forum. For example, this Court has recognized three categories of fora in analyzing the degree of scrutiny applicable to uphold governmental regulation of free speech. The public versus non-public forum distinction is instructional in this case, since the 10th Circuit has emphasized that Kyle's funeral was held in a public high school auditorium.

A traditional public forum has been defined as "property that has as a principal purpose the free exchange of ideas." (Citations omitted). *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679, 112 S.Ct. 2701, 2706 (1992). This Court has repeatedly held that a public forum is not:

> ... created whenever members of the public are permitted to freely visit a place owned or operated by the Government. The decision n [sic] to create a public forum must instead be made by intentionally opening a nontraditional forum for public discourse. (Citations omitted).

Id. at 680, 2706. A public forum is traditionally a locale that: "... qualifies for the description of having immemorially ... time out of mind been held in the public trust and used for purposes of expressive conduct." *Id. See also Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 677, 118 S.Ct. 1633, 1641 (1998) ("Traditional public fora are defined by the objective characteristics of the property, such as whether, by long tradition or government fiat, the property has been devoted to assembly and debate." (Citations omitted)). This Court in *Forbes* further held that:

> Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all.

Id. at 678, 1641.

In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948 (1983), this Court analyzed the public versus non-public forum with regards to access to

public school teachers by competing unions. This Court stated:

> But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. Nowhere have we suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for unlimited expressive purposes. (Citations omitted).

Id. at 44, 954. In determining that the public school teachers' mailboxes were not a public forum, this Court further declared:

> We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum.

Id. at 47, 956.

The Missouri Court of Appeals examined whether a couple's attendance at a hospital function, in which the couple received unwanted publicity, waived their right to privacy. *Y.G. and L.B. v. Jewish Hospital of St. Louis*, 795 S.W.2d 488 (Mo. Ct. App. 1990). The Court held that:

> The mere fact that an event takes place where others are present does not waive the right to privacy... Similarly, disclosing private facts to an individual, even a member of the press, is not consent to publication since a selective disclosure is based on a

> judgment as to whether knowledge by that person would be felt to be objectionable. (Citations omitted).

Id. at 502. Similar to the Petitioners in the present case, the Missouri Court of Appeals determined that the plaintiffs took steps to ensure their participation in the *in vitro* fertilization program would remain private, as plaintiffs: "... were assured that no publicity nor public exposure would occur, that they twice refused interviews or to be filmed, and made every reasonable effort to avoid being filmed..." *Id.* at 501. The Missouri Court of Appeals further stated: "In addition, we cannot hold that attendance at the gathering constituted an appearance in a public place so as to subject appellants to publicity." *Id.* at 502.

Petitioners obtained permission to use the Pryor High School Auditorium and exercised control over the building. Petitioners contend that Kyle's funeral was not a public event and was not held in a public forum. Petitioners suggest that for the purposes of Kyle's funeral, the Pryor High School Auditorium was not a forum at all. *Forbes*, 523 U.S. at 678, 118 S.Ct. at 1641. A funeral is not an environment which has traditionally been open for public debate. Following the reasoning in *Perry, supra.*, the Pryor High School Auditorium did not constitute a public forum, unless the high school opened it "... for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45, 103 S.Ct. at 955. Kyle's funeral was not "a place for expressive activity" but rather the only venue in Pryor, Oklahoma which would accommodate all of Kyle's family and friends, military veterans, and other mourners. The simple fact that Kyle's funeral was open to all those who wished to pay their respects to Kyle and his family similarly did not convert the funeral into a public event. *See International Society for Krishna Consciousness, Inc. v. Lee, supra.* To hold otherwise would subject all individuals who

publish an obituary containing information regarding services for the deceased with a large number of family and friends who wish to attend the funeral of a loved one subject to unreasonable publicity by the media. As set forth fully in Section I above, Kyle's funeral was a private event in which Petitioners had a reasonable expectation of privacy.

Similar to the plaintiffs in *Jewish Hospital, supra.*, Petitioners took every reasonable step to ensure their privacy would be protected during Kyle's funeral service. Petitioners had the right to believe that the media would abide by the family's wishes in exchange for the family's permission to attend Kyle's funeral. It is undisputed that Petitioners directed Stephens to: restrict the media to a designated area during Kyle's funeral, instruct the media not to approach Petitioners or other family members, and instruct the media not to take pictures of Kyle's open casket. (App. 133a). It is unreasonable to suggest that Petitioners were somehow required to post notices at a funeral service that photographs should not be taken. Traditionally, funerals and memorial services are not gatherings in which fear of publicity stands at the forefront of a family's mind, because such actions would clearly offend the reasonable sensibilities of rational persons mourning the dead. Petitioners' actions in placing restrictions upon the media in attendance should have been sufficient to guarantee the family's privacy, but for Turnley's wrongful actions. This Court should therefore grant certiorari to distinguish the characteristics of what constitutes a public event or forum in relation to the funerals of private individuals.

IV. THE DECISIONS OF THE LOWER COURTS CONFLICT WITH THE DECISIONS FROM THIS COURT REGARDING THE APPROPRIATE STANDARDS FOR GRANTING SUMMARY JUDGMENT.

Appellate courts review *de novo* a district court's grant of summary judgment. *S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1139 (10th Cir. 2004). This Court recognized the standard for summary judgment in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986):

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This Court also noted that the non-moving party need not present evidence that would be admissible at trial to avoid summary judgment. *Id.* at 324, 2553. Appellate courts:

> ...must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. Where different ultimate issues may be drawn, the case is not one for summary judgment.

Norton v. City of Marietta, 432 F.3d 1145, 1152 (10th Cir. 2005). *See also James v. Atchison, Topeka & Santa Fe Ry. Co.*, 464 F.2d 173, 175 (10th Cir. 1972):

> ... the courts, trial and appellate, must consider factual inferences tending to show triable issues in a light favorable to the existence of such issues. (Citations omitted). Thus, if there is an inference which can be deduced from the facts whereby decedent might recover, summary judgment is inappropriate.

For a non-moving party to overcome summary judgment, this Court has consistently determined that:

> ...summary judgment... will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.... it is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510 (1986). This Court further held in *Anderson* that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the

> non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 255, 2513.

Federal courts have repeatedly held that: "Disputed issues of fact must be resolved in favor of the non-moving party, and reasonable inferences should be drawn in its favor as well." *Local Union 7107 v. Clinchfield Coal Co.*, 124 F.3d 639, 640 (4th Cir. 1997). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-588, 106 S.Ct. 1348, 1356-1357 (1986); *Abdullahi v. City of Madison*, 423 F.3d 763, 769 (7th Cir. 2005). "On a motion for summary judgment, disputed issues of fact are resolved against the moving party..." *General Elec. Co. v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 517 (1997).

Pursuant to this Court's decisions, the District Court and the Tenth Circuit were required to resolve all disputed issues of fact in favor of Petitioners, and the lower courts' failure to apply the proper standards in ruling on Respondents' Motion for Summary Judgment constitutes reversible error.

A. Petitioners Presented Sufficient Evidence to Overcome Summary Judgment on their Claims for Invasion of Privacy

Petitioners had a reasonable expectation of privacy at Kyle's funeral and presented sufficient evidence that Respondents violated their right to privacy by taking and publishing the photograph of Kyle's open casket without the family's permission. Although the media was allowed to attend Kyle's funeral, Petitioners took reasonable steps to prevent invasions of their privacy by placing limitations upon the media, including: (1) restricting the media to an isolated

area at the rear of the auditorium, in order to limit and restrict the filming/photographing of the service only from that area; (2) prohibiting media contact with the family during the service; and (3) prohibiting the media from taking pictures of Kyle's open casket. (App. 130a and 134a). Stephens testified that he gave these instructions to Turnley and that Turnley agreed to abide by these instructions. (App. 130a).

Petitioners contend that Turnley clearly recognized that Kyle's family had the right to prohibit or restrict the media's attendance at Kyle's funeral. Indeed, he made several telephone calls to Stephens Memorial Chapel requesting permission to attend the service. (App. 133a, 197a). Turnley requested to speak to Kyle's family directly, but was informed that the family did not want to be contacted by the media. (App. 67a). Stephens testified that he spoke to Turnley on two (2) separate occasions, and each time, Turnley agreed to abide by all three (3) of Petitioners' restrictions placed upon the media. (App. 130a, 133a and 134a).

The reasonable person standard asks whether a reasonable person would be offended by the alleged invasion of privacy. Although a stranger might not be offended by the photograph of Kyle in *The Bereaved*, any reasonable person would be offended, indeed outraged, if a picture of their family member lying in an open casket was taken during a funeral or memorial service and subsequently published around the Globe without the permission of the family. Petitioners testified that they were shocked and highly offended by both the multiple pictures of Kyle in his open casket that were sent to Showler and by the publication of the open casket photograph in *The Bereaved*. (App. 131a). It is no surprise that Petitioners suffered severe emotional distress from Respondents wrongful conduct. (App. 49a).

B. Petitioners Presented Sufficient Evidence to Overcome Summary Judgment on their Claims for Fraudulent/False Misrepresentation, Constructive Fraud, Fraud and Deceit

Petitioners presented sufficient circumstantial evidence of Turnley's fraudulent misrepresentations to warrant the submission of this issue to a jury. Additionally, the conflicting testimony regarding whether, in fact, Turnley agreed not to photograph Kyle's open casket is a question that should be resolved by a jury. Oklahoma Courts have set forth the requirements to establish a claim for fraudulent/false misrepresentation as follows:

> To recover under the theory of fraudulent misrepresentation, or deceit, a plaintiff must prove (1) the defendant made a material misrepresentation; (2) that it was false; (3) the defendant made the representation knowing it was false or in reckless disregard of the truth; (4) that the defendant made it with the intention that it should be acted upon *by the plaintiff*; (5) that *plaintiff* acted in reliance upon it; and (6) that plaintiff thereby suffered injury.

Sturgeon v. Retherford Publ'ns, Inc., 987 P.2d 1218, 1228 (Okla. Civ. App. 1999), *citing Ramsey v. Fowler*, 308 P.2d 654 (Okla. 1957). The Oklahoma Supreme Court has recognized that fraud may be proved by circumstantial evidence:

> It is asserted there was circumstantial evidence introduced to establish the ultimate facts of fraud and misrepresentation of defendants that in a total failure to instruct on the value and use of circumstantial evidence the plaintiffs were denied a fair trial.... (9)

> Circumstantial evidence of fraud is admissible in evidence as same relates to the whole transaction between the parties; (10) fraud may be proved by direct or circumstantial evidence, or both; (11) circumstances tending to prove fraud may be admitted into evidence to show the entire transaction between the parties.

Chase v. Watson, 294 P.2d 801, 805 (Okla. 1956). Other jurisdictions have similarly held that circumstantial evidence is sufficient to establish a cause of action for fraud:

> Fraud may be established by circumstantial evidence; however, it may not be presumed, and a party's case will fail if he can show only facts and circumstances which are equally consistent with honesty and good faith. (Citations omitted).... Furthermore, we must resolve direct factual conflicts in favor of Craft, assume as true all facts in her favor which the evidence tends to prove, and give her the benefit of all reasonable inferences.

Craft v. Metromedia, Inc., 766 F.2d 1205, 1218 (8th Cir. 1985).

> It is not essential that direct evidence of fraud be adduced; circumstantial evidence may be sufficient to establish it, and fraud may be proved by evidence wholly circumstantial, or by a combination of direct and circumstantial evidence, and, where in the face of inferences so strong as to make out a prima facie case of fraud defendant remains silent, plaintiff should recover. Where fraud is to be shown by circumstantial evidence, such evidence should be considered in its entirety without giving undue importance to isolated

> facts; although each circumstance alone may be trivial and unconvincing, the combination of all the circumstances considered together may furnish irrefragable and convincing proof of fraud. However, the facts and circumstances proved must clearly establish the inference of fraud.

Jones v. Seal, 409 S.W.2d 382, 385 (Tenn. App. 1966) *citing* 37 C.J.S. Fraud § 115.

Some jurisdictions have also determined that intent may also be proved by circumstantial evidence.

> Fraudulent intent not to perform a promise cannot be inferred merely from the fact of nonperformance. However, evidence of fraud is rarely susceptible of direct proof and must ordinarily be established by circumstantial evidence and the legitimate inferences arising therefrom.... fraudulent intent can be inferred from the additional evidence available. The nature and extent of the party's prior course of dealings, the defendants' knowledge of BPI's financial insecurity, and Kohl's subsequent denial of a promise he was alleged to have made, taken together with all of the evidence, could permit an inference by the fact finders of fraudulent intent. In short, material issues of fact exist with respect to the issue of defendants' intent.

Goshen Litho, Inc. v. Kohls, 582 F.Supp. 1561, 1564 (S.D.N.Y. 1983).

> Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. (Citations omitted). And this choice in turn may be influenced by the fact finder's views on credibility.

> Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe.... although circumstantial evidence may be used to establish any material fact, 'it must transcend mere suspicion.' Reasoning from circumstantial evidence often involves linking apparently insignificant and unrelated events to establish a pattern. A court, therefore, must not view each piece in isolation, but in view of all known circumstances. Nevertheless, 'legally sufficient circumstantial evidence requires a logical bridge between the proffered evidence and the necessary fact.' (Citations omitted)... The mere failure to perform a contract is no evidence of fraud. Denial of having made a promise is also a factor showing no intent to perform when the promise was made.

Beal Bank v. Schleider, 124 S.W. 3d 640, 648-649 (Tex. App. 2003).

Stephens testified that he obtained Turnley's agreement on two separate occasions to abide by Petitioners' three restrictions upon the media. (App. 130a and 134a). Turnley has admitted to giving his promise to abide by two of the restrictions, but not the one about photographs of the open casket. This is a material dispute of fact. (App. 130a). The District Court and the Tenth Circuit were required for the purposes of summary judgment to resolve this dispute in Petitioners' favor, and assume that Turnley did, in fact, agree to not take pictures of Kyle's open casket.

Circumstantial evidence exists to support a finding that Turnley's agreement to abide by Petitioners' restrictions was fraudulent. Turnley made multiple telephone calls to Stephens

Memorial Chapel seeking permission to attend Kyle's funeral. (App. 4a). It is unlikely Turnley would have sought permission except that he believed the family had a right to exclude him. When speaking with Stephens, Turnley admitted that he was informed of Petitioners' restrictions that were placed upon the media allowed to attend Kyle's funeral, and Turnley agreed to such restrictions.[6] Stephens testified that he was prepared to exclude certain specific individuals, including members of the media who refused to abide by the Petitioners limitations. (App.131a).

Clearly, Turnley failed to remain in the area of the auditorium reserved for the press. (App. 134a). Turnley failed to abide by his agreement not to approach Kyle's family at the service. (App. 134a). Turnley's subsequent denial of his agreement to not take pictures of Kyle's open casket combined with his failure to follow the restrictions to which he admittedly agreed is circumstantial evidence of a fraudulent intent when he made his agreement. Petitioners relied on Turnley's agreements to abide by the media limitations when Turnley was granted permission to attend the funeral.

If all of the testimony and evidence presented by Petitioners is taken as true, Petitioners, as a matter of law, have established sufficient circumstantial evidence of Turnley's fraudulent conduct to present their case to a jury. Therefore, the District Court's entry of summary judgment against Petitioners was improper, and the decision of the Tenth Circuit in affirming the District Court's decision constitutes reversible error for failure to apply the appropriate

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[6] Although Turnley's agreement to refrain from taking pictures of Kyle's open casket is in dispute, the lower courts were required to resolve this factual dispute in favor of Petitioners.

standards for summary judgment set forth by this Court. This Court should therefore grant certiorari to reiterate the standards to be applied by district courts regarding summary judgment.

CONCLUSION

The Court should grant certiorari because the Tenth Circuit Court of Appeals has decided an important question of federal law in a way that conflicts with this Court's decision in *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004). The United States Congress, the legislatures of several states, and the United States District Court for the Northern District of Ohio have followed this Court's recognition in *Favish* that family members have a deeply rooted common law right to privacy in the control of the body and death images of their loved ones. The Tenth Circuit's narrow interpretation of *Favish*, as recognizing only the statutory right to privacy contained within the Freedom of Information Act, can only harm a private citizen's common law right to privacy.

The Tenth Circuit improperly discounted Petitioners' right to place restrictions upon the media when it determined that Kyle's funeral was a public event. The Tenth Circuit incorrectly applied the elements necessary to establish a cause of action for fraud, by disregarding the circumstantial evidence supporting Petitioners' cause of action. In direct contravention to this Court's prior decisions, the Tenth Circuit improperly relied upon the District Court's findings of fact, improperly resolved disputed issues of fact in favor of the movant, and improperly considered the facts and inferences in a light most favorable to the movant.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 06-7001

[Filed March 23, 2007]

ROBERT SHOWLER AND JOHNNY DAVIDSON, individually and as special administrator of the Estate of Kyle Adam Brinlee, Plaintiffs-Appellants,	)
v.	)
HARPER'S MAGAZINE FOUNDATION, PETER TURNLEY, individually and in his capacity as a contributing editor to Harper's Magazine, Defendants-Appellees.	)
DENVER POST CORPORATION;	)
MAGAZINE PUBLISHERS OF AMERICA;	)

NEWSPAPER ASSOCIATION OF AMERICA;

NEW YORK TIMES COMPANY;

OKLAHOMA PUBLISHING COMPANY;

PICTURE ARCHIVE COUNCIL OF AMERICA;

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS;

TRIBUNE COMPANY,
Amici Curiae.

(D.C. No. 05-CV-178-S)
(E. D. Okla.).

ORDER AND JUDGMENT *

Before KELLY, BRISCOE, Circuit Judges and ROBINSON, District Judge.**

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** Honorable Julie A. Robinson, U.S. District Judge, District of Kansas, sitting by designation.

Plaintiffs-Appellants Robert Showler and Johnny Davidson filed this suit against Defendants-Appellees Harper's Magazine Foundation ("*Harper's*") and Peter Turnley, alleging they committed various torts when Mr. Turnley took photographs of Sergeant Kyle Brinlee's open casket at his funeral, and when *Harper's* published, promoted and sold the photographs. The district court granted summary judgment to Defendants *Harper's* and Peter Turnley, on all claims. Plaintiffs Showler and Davidson now appeal. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

Viewing the evidence in the light most favorable to Plaintiffs, the record establishes the following facts. *See Metzler v. Fed. Home Loan Bank*, 464 F.3d 1164, 1166 (10th Cir. 2006). Sgt. Kyle Brinlee was a soldier in the Oklahoma National Guard who was killed in action while serving in Iraq on May 11, 2004. He was the first member of the Oklahoma National Guard to be killed in action since the Korean war. As such, Sgt. Brinlee's death and funeral were the subject of intense media coverage. Robert Showler is Sgt. Brinlee's biological father;[1] and Johnny Davidson is his maternal grandfather and the personal representative of his estate.

Sgt. Brinlee's family hired Stephens Memorial Chapel in their hometown of Pryor, Oklahoma to handle the funeral arrangements. The family made the decision to open Sgt. Brinlee's casket at the funeral because his "body looked fine." Prior to the funeral, the family met with Rick Stephens, who ran the memorial chapel. The family relayed to Mr. Stephens

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[1] Brinlee was adopted by Robert Brinlee, at which time Showler's parental rights were terminated.

that although the media was allowed to attend the funeral, the family did not want anyone taking pictures of Sgt. Brinlee's open casket, and they did not want to be interviewed.

Peter Turnley is an international photojournalist who was working on assignment for *Harper's*. Mr. Turnley is a Contributing Editor engaged on a contract basis to produce photo-essays. At the time of Sgt. Brinlee's funeral, Mr. Turnley was working on a photo-essay for *Harper's* concerning those grieving over deaths caused by the war in Iraq. Prior to Sgt. Brinlee's funeral, Mr. Turnley contacted Stephens Memorial Chapel multiple times to ask whether the press would be allowed to attend the funeral. He spoke to Mr. Stephens twice and the office manager, Louise Floyd, once. Mr. Stephens informed Mr. Turnley that he could attend the funeral and take photographs, but that there would be a section at the back of the auditorium designated for the press, and further, that he could not interview the family.

The funeral was held at the Pryor High School gymnasium. Over 1200 people attended the funeral and Governor Brad Henry spoke at the service. Toward the end of the funeral, Sgt. Brinlee's casket was moved to the back of the auditorium, in front of the main exit, and opened. Governor Henry was the first in a line of people who exited by filing past the open casket on their way out of the auditorium. Mr. Turnley, along with other photographers in the press section of the auditorium, took photographs during the service. Only Mr. Turnley took photographs of Sgt. Brinlee in his open casket.

After the graveside service, Mr. Turnley approached Mr. Showler and introduced himself, and then indicated he had photographed the funeral on assignment from *Harper's*. Mr. Turnley asked Mr. Showler if he would like copies of the

photographs. Mr. Showler responded affirmatively and provided Mr. Turnley with his address. Mr. Showler was unaware that Mr. Turnley had taken photographs of the open casket, however. Mr. Showler first learned of the open-casket photographs when he received copies from Mr. Turnley in the mail.

One of the photographs taken by Mr. Turnley, "the Turnley Photo," along with nineteen other photographs dealing with the mourning of Americans and Iraqis killed in the war, was published in the August 2004 edition of *Harper's*. The photo-essay was titled: "The Bereaved, Mourning the Dead, in America and Iraq." *Harper's* promoted the photo-essay, and Mr. Turnley conducted interviews about it with news agencies, appeared in television programs, and entered the photograph in numerous competitions. Defendants sold the photo-essay to French magazine *Le Monde 2* where it was also published.

Plaintiffs filed suit in diversity against Mr. Turnley and *Harper's*, alleging the following tort claims: Intentional Infliction of Emotional Distress (Count 1); Invasion of Privacy (Count II);[2] Violation of Okla. Stat. tit. 21, § 839.1 (Count III); Fraudulent /False Misrepresentation (Count IV); Constructive Fraud, Fraud and Deceit (Count V); Unjust Enrichment (Count VI); and Negligent Hiring, Retention, and Supervision (Count VII).

On December 22, 2005, the district court entered an order granting Defendants' motion for summary judgment on all

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[2] Plaintiffs' claim for invasion of privacy is based on three theories: appropriation, intrusion into seclusion, and publication of private facts.

claims. The district court held that Defendants enjoyed First Amendment protection because the Turnley Photo was taken in a public place for a newsworthy article and, alternatively, that summary judgment was appropriate on the merits of each tort claim. This appeal followed.

II.

On appeal, Plaintiffs assert that the district court erred in granting Defendants' motion for summary judgment. We review the district court's grant of summary judgment *de novo*, applying the same legal standard as the district court. *Mountain West Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 470 F.3d 947, 950 (10th Cir. 2006). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The inquiry essentially determines if there is a need for trial, or whether the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

When examining the underlying facts of the case, the Court is cognizant that all inferences must be viewed in the light most favorable to the nonmoving party and that it may not make credibility determinations or weigh the evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Further, the Court has "discretion to affirm on any ground adequately supported by the record, so long as the parties have had a fair opportunity to address that ground." *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1088 (10th Cir. 2006) (quotations omitted).

Before reaching any constitutional question, "federal courts must consider nonconstitutional grounds for decision." *Jean v. Nelson*, 472 U.S. 846, 854, 105 S. Ct. 2992, 2997, 86 L. Ed. 2d 664 (1985); *see also United States v. Hardman*, 297 F.3d 1116, 1124 (10th Cir. 2002). Because we determine that none of the tort claims asserted in Plaintiffs' Second Amended Complaint can survive summary judgment, we decline to consider whether Defendants' actions were privileged under the First Amendment.

A. Intentional Infliction of Emotional Distress

Oklahoma has adopted section 46 of the RESTATEMENT (SECOND) OF TORTS (1977). *See Miller v. Miller*, 1998 OK 24, 956 P.2d 887, 900 (Okla. 1998). An action for this tort will lie only where there is extreme and outrageous conduct coupled with severe emotional distress. *Id.*

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'...

Id. at 901 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d). Also, the Defendants' conduct must be "considered in the setting in which the conduct occurred." *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1292 (N.D. Okla. 2006) (citing *Eddy v. Brown*, 1986 OK 3, 715 P.2d 74, 77 (Okla. 1986)).

The district court acts as a gatekeeper to determine whether the Defendants' conduct may reasonably be regarded as sufficiently extreme and outrageous and whether severe emotional distress can be found based on the evidence. *Miller*, 956 P.2d at 901; *Breeden v. League Servs. Corp.*, 1978 OK 27, 575 P.2d 1374, 1377 (Okla. 1978); *see* RESTATEMENT (SECOND) OF TORTS § 46 cmt. h. If the court finds that reasonable people would differ in an assessment of this issue, then the tort claim may be submitted to a jury. *See, e.g.*, *Breeden*, 575 P.2d at 1377. Here, the district court found that the Turnley Photo was not outrageous. It based its decision on the fact that the photo accurately depicts the exact image that Plaintiffs chose to expose to approximately 1200 people who attended Sgt. Brinlee's funeral. The district court also pointed out that Plaintiffs made the decision to have an open casket at the funeral because Sgt. Brinlee's "body looked fine," and further found that the mere fact that the photograph was of a deceased person was not enough to constitute outrageous conduct.

Plaintiffs argue that whether the photograph was, in and of itself, "grotesque" is immaterial. Instead, Plaintiffs urge that it was outrageous conduct for Mr. Turnley to disregard specific instructions from Mr. Stephens not to photograph the open casket at the funeral. Because this material fact is in dispute— Mr. Turnley denies that this condition was placed on his attendance— Plaintiffs maintain that summary judgment was inappropriate because reasonable minds could differ about whether Mr. Stephens relayed this condition and therefore, whether Mr. Turnley ignored the condition when he took the photographs.

We conclude that neither the photograph, nor the alleged breach of an agreement by Mr. Turnley constituted conduct that was so extreme and outrageous "as to go beyond all

possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. The fact that the photograph was of a deceased's body is not, standing alone, outrageous, even if it was unauthorized. *See Cox Tex. Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 724 (Tex. App. 2001) ("Taking pictures of a dead body is not intolerable; in fact, such pictures are frequently taken in a variety of situations. Publication of the rather dignified, albeit unauthorized, pictures...was not extreme and outrageous conduct...."). Nor is the fact that the photograph was unauthorized transform Mr. Turnley's actions into outrageous conduct. *See Loft v. Fuller*, 408 So. 2d 619, 621-22 (Fla. Dist. Ct. App. 1981) (finding portrayal of deceased family member in book as a "ghost," without permission from his family, did not amount to outrageous conduct).

Further, it is undisputed that the photograph accurately reflects the image of Sgt. Brinlee's funeral and open casket, as seen by the 1200 people in attendance. *Compare Wootten*, 59 S.W.3d at 724 *with Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333, 338 (Wash. 1998) (finding disclosure of autopsy photographs of deceased relatives outrageous). Such "fair and accurate media coverage of official public occasions is in the highest and best interest of the public, [and]...cannot be treated as actionable under this rubric." *Wright v. Grove Sun Newspaper Co.*, 1994 OK 37, 873 P.2d 983, 990 (Okla. 1994). Because we agree with the district court that Defendants' actions did not rise to the level of extreme and outrageous conduct, summary judgment was appropriate on this tort claim.

B. Invasion of Privacy

Plaintiffs assert three of the four branches of the tort of invasion of privacy: (1) appropriation; (2) publication of private facts; and (3) intrusion upon seclusion. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A-E (1977) (describing the different types of privacy torts). In addition, Plaintiffs assert a claim under Okla. Stat. tit. 21, § 839.1. For these claims, Plaintiffs rely generally on the Supreme Court's decision in *National Archives & Records Administration v. Favish*, which held that the privacy exemption in the Freedom of Information Act ("FOIA") recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images. 541 U.S. 157, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004). That case involved a private citizen who requested production under the FOIA of death-scene photographs of Vince Foster, deputy counsel to President Clinton, who was found dead of an apparent suicide. Plaintiffs particularly rely on language in that case that the common law has long recognized "a family's control over the body and death images of the deceased." *Favish*, 541 U.S. at 168; 124 S. Ct. at 1578.

Favish is inapplicable to this analysis because it relies on a statutory privacy right under the FOIA, not a cause of action for invasion of privacy. In fact, the Supreme Court observed in *Favish* that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution." *Id.* at 170, 124 S. Ct. at 1579 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762, 109 S. Ct. 1468, 1476, 103 L. Ed. 2d 774 (1989)). Likewise, the Court stated in *Reporters Committee* that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of

privacy or the question whether an individual's interest in privacy is protected by the Constitution." *Reporters Committee*, 489 U.S. at 763 n.13; 109 S. Ct. at 1476. Here, the Court will limit its reliance to the case law construing the tort of invasion of privacy and the specific Oklahoma statute at issue.

Moreover, the Supreme Court's discussion in *Favish* about the cultural history of burial rights of the deceased and surviving family members is inapposite to the facts of this case. The Court references "outrage at seeing the bodies of American soldiers mutilated and dragged through the streets," *Favish*, 541 U.S. at 168, 124 S. Ct. at 1578, as a modern example of "the interests decent people have for those whom they have lost." *Id.* This type of intrusion and exploitation of the family's grief has traditionally been considered a violation of the family's privacy rights. *Id.* Indeed, all of the cases cited by the Court in support of its acknowledgment that the common law has recognized a family's right to control the death images of the deceased, involve death images that are gruesome and none involve images displayed at a public funeral. *See id.* at 169, 124 S. Ct. at 1578-79 (collecting cases).

Courts that have found an invasion of privacy have done so when the case involves death-scene images such as crime scene or autopsy photographs.[3] The photographs here are not

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[3] *See, e.g., id.* at 161, 124 S. Ct. at 1574; *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333, 338 (Wash. 1998); *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909, 915 (Ark. 1989); *c.f. Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (Ga. 1930) (finding invasion of privacy where, after performing surgery on a baby born with his heart on the outside of his body, hospital employees allowed a photographer to photograph

death-scene photographs, but images of Sgt. Brinlee in his military uniform that accurately depict the image seen by those who attended his funeral to pay their respects. Coupled with the public nature of this funeral, the photographs are distinguishable from those at issue in *Favish*.

We now address the specific theories of liability asserted by Plaintiffs.

1. Appropriation and Okla. Stat. Ann. tit. 21, § 839.1

Oklahoma has codified the cause of action for appropriation of a person's name or likeness in Okla. Stat. Ann. tit. 21, § 839.1 (2002). Under the RESTATEMENT (SECOND) OF TORTS § 652C, "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." Plaintiffs appear to bring separate claims for appropriation under both the common law and statutory law, despite the fact that the statute overlaps with the Restatement's formulation of the cause of action. *See Le Flore v. Reflections of Tulsa, Inc.*, 1985 OK 72, 708 P.2d 1068, 1074 (Okla. 1985) (construing claim for appropriation under the Restatement as a claim under Oklahoma's appropriation statute). We agree with the district court that there is no genuine issue of material fact with regard to either source of law on appropriation.

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the child's body and a newspaper to report on the baby's condition, unbeknownst to the parents.), *called into question by Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344, 348 (Ga. 1956). *But see Bremmer v. Journal-Tribune Publ'g Co.*, 247 Iowa 817, 76 N.W.2d 762, 766-67 (Iowa 1956) (explaining that *Bazemore* was an extreme set of facts and that the majority of courts have declined to find liability when the press publish details of gruesome death scenes).

Comment d to the RESTATEMENT § 652C is instructive:

> No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness. Thus a newspaper, although it is not a philanthropic institution, does not become liable under the rule stated in this Section to every person whose name or likeness it publishes.

The Court concludes that this comment from the Restatement squarely applies to the facts presented here. *Harper's* is not liable under an appropriation theory simply because it sought to make a profit via the circulation of its magazine when it published the photo essay that included the Turnley Photo.

With regard to the statute, the district court granted summary judgment on this claim because there was no evidence of "advertising." In so holding, the court stated that Oklahoma had, in the past, sought guidance from New York law when interpreting this statute because it was patterned after a similar New York law. *See Le Flore v. Reflections of Tulsa, Inc.*, 1985 OK 72, 708 P.2d 1068, 1074 (Okla. 1985) (discussing the similarity between New York's appropriation statute and § 839.2 and looking to New York cases for guidance). New York law has made clear that right to privacy

statutes do not apply to newsworthy events or matters of public concern because it is not deemed for the purposes of advertising or trade. *See, e.g.*, *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 441, 727 N.E.2d 549, 706 N.Y.S.2d 52 (N.Y. 2000).

The New York Court of Appeals further held that "where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability...unless the picture has no real relationship to the article or the article is an advertisement in disguise." *Id.* at 442. Sgt. Brinlee's funeral was a matter of public interest. Local and regional newspapers printed stories and photographs about his death and funeral. There was particular interest in the story since Sgt. Brinlee was the first member of the Oklahoma National Guard to be killed in action since the Korean War. There is no evidence to suggest that the Turnley Photo, or any of the other photographs taken, were not related to the photo-essay that concerned grieving in the United States and Iraq over deaths caused by the war in Iraq. And, the fact that the photo essay was promoted and sold to another publication does not render it an advertisement under the statute. *Messenger*, 94 N.Y.2d at 442 ("[T]he fact that a publication may have used a person's name or likeness 'solely or primarily to increase the circulation' of a newsworthy article— and thus to increase profits —does not mean that the name or likeness has been used for trade purposes within the meaning of the statute."). The Turnley Photo did not constitute an appropriation of Sgt. Brinlee's likeness for commercial purposes under either the Restatement or the statute and summary judgment was appropriate on these claims.

2. Publication of Private Facts

In order to recover for invasion of privacy by publication of private facts, the publication must: (1) be highly offensive to a reasonable person; (2) contain private facts; (3) be a public disclosure of private facts; and (4) not be of legitimate concern to others. *Guinn v. Church of Christ of Collinsville*, 1989 OK 8, 775 P.2d 766, 781 (Okla. 1989). The district court found that Plaintiffs failed to establish that the Turnley Photo contained private facts about their lives or that there was a public disclosure of a private fact. Further, the district court found that because the funeral was a newsworthy event, it was of legitimate concern to others, especially considering the fact that this was the first Oklahoma National Guardsman to die in combat since the Korean War.

Plaintiffs argue on appeal that the family's mourning over Sgt. Brinlee's death was a deeply private manner. They also maintain that Mr. Turnley acknowledged this by contacting Mr. Stephens to request permission to attend, which he would not have done had he believed it to be a public event. Defendants respond that under Comment a to RESTATEMENT (SECOND) OF TORTS § 652D, the Plaintiffs left themselves "open to the public eye."

We agree with Defendants that Plaintiffs opened up the funeral scene to the public eye and can not, therefore, establish that Defendants disclosed private facts by publishing the Turnley Photo. The local newspaper notified the public in advance of the time and place of Sgt. Brinlee's funeral, and it was held in a high school gymnasium to accommodate the large crowd expected to attend. Governor Henry spoke at the funeral, which was attended by 1200 people. Most attendees exited the funeral by first filing past Sgt. Brinlee's open casket. Numerous area newspapers published stories about

Sgt. Brinlee's death and funeral. These facts belie the notion that the Turnley Photo revealed information that was private and summary judgment is appropriate on this claim.

3. Intrusion Upon Seclusion

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977). The Oklahoma Supreme Court has recognized the following two necessary elements of this claim: (1) a nonconsensual intrusion, (2) which is highly offensive to a reasonable person. *See Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1220 (10th Cir. 2003) (citing *Gilmore v. Enogex, Inc.*, 1994 OK 76, 878 P.2d 360, 366 (Okla. 1994)). Publication is not necessary to maintain an action for this tort; the intrusion itself creates liability. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b.

We agree with the district court that there was no genuine issue of material fact about whether Mr. Turnley intruded into the private affairs of Plaintiffs for the same reasons that summary judgment is appropriate on the other privacy claims. Even if the Court assumes Plaintiffs can meet their burden of establishing a genuine issue of material fact that an intrusion occurred, there is no evidence upon which a reasonable jury could conclude that the intrusion was highly offensive to a reasonable person. As already discussed, the photographs accurately depicted a funeral that Plaintiffs held out to the public. Details about the funeral were published in the local newspaper and it was held in a high school gymnasium in order to accommodate the 1200 people who attended, which included the Governor of Oklahoma. Mr. Turnley took the

photographs from an area of the high school auditorium that was specifically designated for the press and other photographers were present. The district court did not err in granting summary judgment to Defendants on this claim.

C. Fraud Claims

Plaintiffs asserted claims for fraudulent or false representation and constructive fraud based on Mr. Turnley's conversation with Mr. Stephens in which Plaintiffs argue Mr. Stephens placed the specific condition on Mr. Turnley's attendance at the funeral that he not photograph the open casket. The district court granted summary judgment to Defendants on these claims because, based on the uncontroverted facts, any misrepresentation or fraud committed by Mr. Turnley was made toward Mr. Stephens and not the Plaintiffs in this matter. Plaintiffs appeal the district court's order and argue that it misapplied principles of agency law in granting summary judgment on these claims.

Plaintiffs do not allege a contract existed between the parties, but instead base these claims on an unkept promise. Oklahoma law requires the following elements to establish a claim for a false or fraudulent misrepresentation: (1) the defendant made a material misrepresentation; (2) that was false; (3) the defendant made the misrepresentation knowing it was false, or in reckless disregard of the truth; (4) the defendant made the representation with the intention that it should be acted upon by the plaintiff; (5) the plaintiff acted in reliance upon it; and (6) plaintiff thereby suffered injury. *Sturgeon v. Retherford Publ'ns, Inc.*, 1999 OK CIV APP 78, 987 P.2d 1218, 1228 (Okla. Civ. App. 1999) (citing *Ramsey v. Fowler*, 1957 OK 61, 308 P.2d 654, 656 (Okla. 1957)).

Even if Plaintiffs are correct that the district court misapplied agency principles when it granted summary judgment on the fraud claims, Plaintiffs are unable to establish that when Mr. Turnley allegedly promised Mr. Stephens that he would not photograph the open casket, he did not intend to perform that promise. Under Oklahoma law, the general rule is that when a false representation is the basis of the fraud, that representation must relate to existing facts or previously existing facts, and not to promises of some future act. *Roberts v. Wells Fargo AG Credit Corp.*, 990 F.2d 1169, 1172 (10th Cir. 1993). An exception to this rule exists where such a promise to act in the future is made with the intention not to perform and with the intent to deceive. *Id.* "The gist of the rule is not the breach of promise but the fraudulent intent of the promisor at the time the pledge is made not to perform the promise so made and thereby deceive the promisee." *Citation Co. Realtors, Inc. v. Lyon*, 1980 OK 68, 610 P.2d 788, 790 (Okla. 1980).

Plaintiffs are unable to point the Court to evidence of Mr. Turnley's intent at the time he spoke to Mr. Stephens on the phone prior to the funeral. Instead, they argue that the issue is one of credibility, which should be made by a jury. Yet Plaintiffs produce no evidence refuting Mr. Turnley's stated lack of intent, nor any evidence disputing the credibility of Mr. Turnley's statement that he lacked such intent.

Furthermore, the claims fail because Plaintiffs are unable to establish that they acted in reliance upon any statement allegedly made by Mr. Turnley. While there is a disputed fact about whether Mr. Turnley at least implicitly agreed not to photograph Sgt. Brinlee's open casket as a condition of his attendance at the funeral, other photographers were present at the funeral. And there is no evidence that the media was required to contact Mr. Stephens ahead of time to obtain

permission to attend. While some members of the public did inquire with Stephens Memorial Chapel about whether the press would be allowed to attend the funeral, there is no evidence that this was required. The funeral was open to the public, and there were no signs limiting the photographers' permission to photograph the funeral. These facts reveal no genuine issue of material fact about whether Plaintiffs reasonably relied on a promise by Mr. Turnley in allowing him to attend as a member of the press. Summary judgment is thus appropriate on Plaintiffs' fraud claims.

D. Unjust Enrichment

Plaintiffs' claim for unjust enrichment is based on the allegation that Defendants were unjustly enriched by the publication and promotion of the Turnley Photo. "The term 'unjust enrichment' describes a condition resulting from the failure of a party to make restitution in circumstances where it is inequitable." *N.C. Corff P'ship v. OXY USA, Inc.*, 1996 OK CIV APP 92, 929 P.2d 288, 295 (Okla. Civ. App. 1996); *see also Lapkin v. Garland Bloodworth, Inc.*, 2001 OK CIV APP 29, 23 P.3d 958, 961 (Okla. Civ. App. 2000). Unjust enrichment is a theory of recovery and requires "enrichment to another coupled with a resulting injustice." *N.C. Corff P'Ship*, 929 P.2d at 295. As the district court properly reasoned, there is no evidence here of any advantage to *Harper's* or Mr. Turnley at the expense of Plaintiffs. Likewise, there is no evidence of injustice to the Plaintiffs. Plaintiffs argue that the photo was used to promote the magazine and Mr. Turnley at the expense of their right to privacy. As this Court has already determined, there is no genuine issue of material fact with regard to Plaintiffs' right to privacy claims. Summary judgment was appropriate on Plaintiffs' unjust enrichment claim.

E. Negligent Hiring

An employer may be held liable in Oklahoma for negligent hiring, supervision, or retention of an employee. *See Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1156 (10th Cir. 2006); *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, 998 P.2d 592, 600 (Okla. 1999). The employer may be liable, "if— at the critical time of the tortious incident —the employer had reason to believe that the person would create an undue risk of harm to others. Employers are held liable for their prior knowledge of the servant's propensity to commit the very harm for which damages are sought." *Presbyterian Church (U.S.A.)*, 998 P.2d at 600. Because we find that summary judgment is appropriate on all of Plaintiffs' underlying claims, *Harper's* may not be found liable to Plaintiffs based on its hiring, supervision, or retention of Mr. Turnley. Further, Plaintiffs do not point to any evidence of prior knowledge by *Harper's* of any propensity by Mr. Turnley to commit any of the torts alleged against Mr. Turnley in the Second Amended Complaint.

III.

While it could be argued that publication of the Turnley Photo without prior authorization was in poor taste, for the reasons discussed, it does not constitute an actionable claim under any of the theories advanced by Plaintiffs. Because we conclude that summary judgment was appropriate on each of the Oklahoma state tort claims asserted by Plaintiffs in this action, we need not address the First Amendment defense asserted by Defendants in this appeal, nor do we make any statement as to the merits of that defense. The judgment of the district court is affirmed. The motion for leave to file an amicus brief by Denver Post Corporation, Magazine Publishers of America, Newspaper Association of America,

New York Times Company, Oklahoma Publishing Company, Picture Archive Council of America, The Reporters Committee for Freedom of the Press and Tribune Company is granted.

Entered for the Court

Julie A. Robinson
District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 05-178-S

[Filed December 22, 2005]

ROBERT SHOWLER and JOHNNY DAVIDSON, Individually and as Special Administrator of the Estate of Kyle Adam Brinlee, Plaintiffs,	)
v.	)
HARPER'S MAGAZINE FOUNDATION, PETER TURNLEY, Individually and in his capacity as a Contributing Editor to HARPER'S MAGAZINE, Defendants.	)

ORDER

Before the court for its consideration is the Defendant Harper's Magazine Foundation and Peter Turnley's Motion for Summary Judgment filed November 10, 2005. The court rules as follows on the motion.

Findings of Facts

Sgt. Kyle Adam Brinlee Showler ("decedent") was a carpentry and masonry specialist in the Oklahoma Army National Guard. Plaintiff Robert Showler ("Showler") is decedent's biological father[1] and Plaintiff Johnny Davidson ("Davidson") is decedent's biological grandfather. Decedent was killed in action in Iraq on May 11, 2004. He was the first Oklahoma National Guard member to be killed since the Korean conflict in the early 1950s. Brinlee Showler's death in Iraq and events surrounding his funeral and burial in Pryor, Oklahoma, were listed in Pryor Creek, Oklahoma's *The Daily Times* "2004: Year In Review" as the number one news story of 2004.

Decedent's funeral was held in the Pryor High School Auditorium on May 19, 2004. The funeral was open to the public. At the request of Showler, Oklahoma Governor Brad Henry attended and spoke at the funeral. Approximately 1200 people attended the funeral. A local newspaper reported "friends, family, admirers, classmates, military personnel, acquaintances and strangers filled the Pryor High School Auditorium to capacity." At the instruction of the plaintiffs, decedent's casket was placed at the back of the auditorium and was open at the conclusion of the funeral service. Funeral attendees passed by the open casket as they exited the high school auditorium. The decision to have an open casket funeral was made by plaintiffs because decedent's body looked "just fine". Decedent's body was also available for public viewing for three days prior to the funeral at Stephens

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[1] In 1993, decedent was adopted by Ronald Brinlee, his then stepfather.

Memorial Chapel. Stephens Memorial Chapel was the entity handling the funeral arrangements for the decedent.

Defendant Peter Turnley ("Turnley") is a photojournalist who was working on assignment for Harper's Magazine. Turnley was working on a photo essay for the magazine regarding deaths caused by the war in Iraq. He contacted Stephens Memorial Chapel in Pryor, Oklahoma, to request permission to attend the funeral. Turnley was granted permission to attend the funeral by Rick Stephens ("Stephens"), the individual in charge of the funeral. He and his staff were handling all requests by the press for admission to the funeral. Stephens informed Turnley there would be a section in the auditorium designated for the press. He told Turnley he could attend the funeral and sit in that section. Turnley, along with others members of the press, attended the funeral. Turnley took a picture of the open casket. The photograph was a truthful and accurate depiction of the image that any member of the public who attended the funeral saw or could have seen as they exited the Pryor High School Auditorium after the funeral. This picture, along with several other photographs dealing with the death associated with war, were published in Turnley's photo essay titled "The Bereaved". "The Bereaved" was published in the August edition of Harper's Magazine.

After the graveside service, Turnley spoke to Showler and asked him if he would like to have a copy of the pictures taken at the funeral. Showler indicated he would like to have the photos and gave Turnley his address. Turnley never spoke to Davidson. Showler called Harper's Magazine in June 2004 asking when Turnley's story about decedent would be published and inquired about the photographs of the funeral Turnley had offered to send. Before Turnley sent the photos, he again confirmed that Showler wanted the pictures. It was

when Showler received these photos that he realized Turnley had taken pictures of the open casket.

I. First Amendment

As a preliminary matter, the court addresses the First Amendment issue raised by the defense in this case. While the court's findings in this regard may not bear directly upon the disposition of causes of action contained within the second amended complaint, the court finds a discussion of the First Amendment issues to be instructive.

In *Time. Inc. v. Sand Creek Partners, L.P.*, 825 F.Supp. 210, 212 (S.D. Ind. 1993), the court stated:

> In general, when a person's picture is used to illustrate a non-commercial, newsworthy article, his interest in the use of his likeness or image must be evaluated in light of constitutional interests found in the First Amendment. *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 (9th Cir.1988), citing, *Martinez v. Democrat-Herald Pub. Co.*, 669 P.2d 818, 820 (1983). "Newsworthiness" is a First Amendment, Freedom of Press, interest and is to be broadly construed. As one court has explained: "The scope of the subject matter which may be considered of 'public interest' or 'newsworthy' has been defined in most liberal and far reaching terms. The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general." *Rogers v. Grimaldi*, 695 F. Supp. 112, 117 (S.D.N.Y.1988), citing, *Paulsen v.*

Personality Posters, Inc., 299 N.Y.S.2d 501, 506 (1968).

It has long been recognized that use of a name or picture by the media in connection with a newsworthy item is protected by the First Amendment. *Time, Inc. v. Hill*, 385 U.S. 374, 388-389 (1967) and *Gilbert v. Medical Economics Company*, 665 F.2d 305, 308 (10th Cir. 1981) (...it is clear from the foregoing that the First Amendment protects the publication of private facts that are "newsworthy", that is, of legitimate concern to the public.)

The issue of newsworthiness has been treated as one of either fact or law depending on the circumstances presented. *Virgil v. Time*, 527 F.2d 1122, 1130 (9th Cir.1985) and *Gilbert*, 665 F.2d at 309. Thus, whether newsworthiness is a question for the judge or the jury depends upon the evidence submitted. Where material facts are in dispute, or where the facts present a particularly close question as to newsworthiness, summary judgment is inappropriate. As in other cases, the initial determination of whether or not a factual question exists is for the court. *Virgil*, 527 F.2d at 1130. The court finds the material facts of this case regarding newsworthiness are not in dispute. Thus, the court can make the determination about newsworthiness for First Amendment purposes.

The following facts are undeniably undisputed. Decedent was the first Oklahoma National Guard member to be killed in conflict since the Korean War. His funeral was open to the public and attended by approximately 1200 people. At the request of Showler, Brad Henry the Governor of the state of Oklahoma spoke at the funeral. The court finds the citizens of the state of Oklahoma and the United States of America had an interest in the death of a United States citizen solider.

Based upon the case law and the facts of this case, the court finds the death of decedent and his subsequent funeral and burial to be newsworthy events.

In essence plaintiffs are seeking to restrain defendants' First Amendment right to distribute an informative photo essay of a newsworthy event. To prevail, plaintiffs must demonstrate their privacy interests outweigh First Amendment concerns. *Bartnicki v. Vopper,* 532 U.S. 514, 534 (2001). In *Bartnicki,* the United States Supreme Court stated:

> One of the costs associated with participation in public affairs is an attendant loss of privacy....state action to punish the publication of truthful information seldom can satisfy constitutional standards. More specifically, this court has repeatedly held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need...of the highest order...As Warren and Brandeis stated in their classic law review article: 'The right of privacy does not prohibit any publication of matter which is of public or general interest.' The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890). *Id.* at 527-534. (Citations omitted)

It is well settled law that the First Amendment provides protection for news coverage of public events. It appears undisputed the funeral of decedent was a public event. It was held in a high school auditorium and it was open to the public. The court has previously found it was a newsworthy event. There is also no dispute the photograph which was taken was an accurate depiction of an event which occurred at the funeral.

Plaintiffs have argued they had a right to privacy to say goodbye to their loved one in the manner which they saw fit and defendant Harper's Magazine's publication of the picture in question violated that right. In support of their argument that they had a right to control the funeral and burial of their loved one, plaintiffs cite *National Archives and Records Administration v. Favish,* 541 U.S. 157 (2004). *Favish* dealt with a request of a private individual for production of already existing government photographs under the federal Freedom of Information Act. In *Favish*, an individual was requesting official photographs taken by the Capital Hill Police of the site of Deputy White House Counsel Vince Foster's suicide. These photographs had not been made public. In the *Favish* decision, the court notes the family's right to control disposition of the body of their loved one and to limit intrusion of the public. This court finds the *Favish* case distinguishable from the case at bar because the photograph in question was taken at a public, newsworthy event. The scene documented in the photograph was the same scene the funeral attendees observed.

Further, the court finds *Favish* not applicable because the court does not see how the defendants interfered with the plaintiffs burying of their loved one. Plaintiffs made all the decisions regarding the funeral and burial. Attendance at the funeral and viewing of the decedent could have been limited to the family or even plaintiffs but plaintiffs chose to open it to all comers. Plaintiffs had the right to control the burial of their loved one but chose to toss control of the event to the wind and even sought celebrity of politicians and the public. Defendants did not interfere with this process but rather photographed what plaintiffs chose to make public. Thus, the facts do not indicate that their right to privacy was violated in regard to the funeral and burial of the decedent.

Finally, the court finds plaintiffs' right to privacy in burying their loved one does not outweigh the right of the public to view this newsworthy photo under these circumstances. In fact, plaintiffs appear to have put the death of their loved one in the public eye intentionally to draw attention to his death and burial. That would be the only reason for inviting the press to attend the funeral. Plaintiffs wanted the death of their loved one publicized. Plaintiffs, not defendants, made the funeral of decedent a public event. Plaintiffs, not defendants, chose to have the casket open at the funeral. Plaintiffs, not defendants, decided to invite the press to the funeral. If the plaintiffs wanted to grieve in private they should not have held a public funeral and had a section reserved for the press. It is difficult for the court to see how plaintiffs can now complain that their right to privacy was violated about something they intentionally chose to expose to the public.

This case is similar to *Cheatham v. Paisano Publications, Inc.*, 891 F.Supp. 381 (W.D.Ky.1995). In *Cheatham*, plaintiff, a clothing designer wore some of her unusual designs to a public event. Turnley was complying a photo essay of the event and published a picture of plaintiff wearing one of her unusual outfits. Plaintiff sued. The court found that plaintiff wore her unusual design to the public event to attract attention to herself and her design. In so finding the court stated:

> Paisano's merely took photos at the event and published them as part of their photo essay of the event. In doing so, Paisano's invaded no rights of Plaintiff's. This Court finds that publishing Plaintiff's photo as part of the photo essay is a newsworthy item and is entitled to First Amendment protection. *Id.* at 386.

Such is also true in the case at bar. Defendants merely published pictures of a public event in their photo essay. In *Neff v. Time, Inc.*, 406 F. Supp. 858, 861 (W.D. Pa. 1976) the court stated:

> A factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities. The constitutional privilege protects all truthful publications relevant to matters of public interest.

The court finds the fact this picture was taken in a public place for a newsworthy article, entitles the defendants to First Amendment protection. *Time, Inc.*, 385 U.S. at 397, n.5.[2]

II. Intentional Infliction of Emotional Distress

In order to establish their claim for intentional infliction of emotional distress, plaintiffs must show (1) intentional conduct, (2) so outrageous and extreme to go beyond the bounds of decency, and (3) which causes mental distress so severe no reasonable person could be expected to endure it. *Breeden v. League Services Corporation,* 575 P.2d 1374, 1376 (Okla. 1974). Oklahoma law requires the trial court to determine as a matter of law if the alleged conduct of the defendant is sufficiently extreme and outrageous, as defined in Sec. 46 of the Restatement (Second) of Torts, to allow recovery. *Id.* at 1377. "It is also the trial court's initial

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[2] Plaintiffs have also argued that defendants are not entitled to First Amendment protections because they committed a crime or a tort in obtaining the picture. As will be discussed subsequently in this order, the court has found no tort was committed in taking the photo. Further, the Turnley broke no laws in taking the photo.

responsibility to determine whether the stress allegedly suffered by the Plaintiff is severe emotional distress." *Zeran v. Diamond Broadcasting,* 203 F. 3d 714, 721 (10th Cir. 2000).

Assuming plaintiffs could establish either intentional or reckless conduct they cannot establish the next element of this tort. Plaintiffs cannot establish that the publication of the picture was so outrageous and extreme as to go beyond all possible boundaries of decency. It is important to note that the plaintiffs made the decision to have an open casket funeral because the decedent's body "looked fine". The picture was an accurate depiction of the decedent in the casket. Plaintiffs make no allegation that the photograph is grotesque. Plaintiffs simply allege in their second amended complaint, "[t]he published photograph depicts the remains of a deceased human being and is emotional, sensational and disturbing." However, it is a picture of the exact same image of which they intentionally chose to expose the approximately 1200 people who attended the funeral. It is difficult to conceive how plaintiffs can now claim this same image is so outrageous and extreme as to go beyond all bounds of decency.

Plaintiffs seem to contend the mere fact Turnley took a photograph of a deceased person and the fact Harper's Magazine published it, is enough to establish intentional infliction of emotional distress. Mere publication of a picture of a dead body is not enough to constitute extreme and outrageous conduct. In *Cox Texas Newspapers, L.P. v. Wootten*, 59 S.W. 3d 717 (Tex. Ct. App. 2001), Mr. Wootten's wife had died. He had given the funeral home specific instructions not to open her casket, as she had requested not to be viewed after death. The Austin American-Statesmen was doing a story on funeral homes. They were given full access to the funeral home and took a picture of

Mr. Wooten's wife in her casket. In ruling the plaintiff did not have a claim for emotional distress, the court stated: "Taking pictures of a dead body is not intolerable; in fact, such pictures are frequently taken in a variety of situations. Publication of the rather dignified, albeit unauthorized, pictures of Barbara Wootten's body was not extreme and outrageous conduct by the Statesman." *Id.* at724. Accordingly, the court grants the defendants' request for summary judgment on the plaintiffs' claim for intentional infliction of emotional distress.

III. Invasion of Privacy

Oklahoma recognizes four invasion of privacy torts. *McCormack v. Oklahoma Publishing Company*, 613 P.2d 737, 739 (0kl. 1980). In their second amended complaint, plaintiffs allege three of those causes of action.

First, plaintiffs allege the tort of appropriation. Appropriation is available when another's name or likeness is appropriated for a commercial purpose. *LeFlore v. Reflections of Tulsa, Inc.*, 708 P.2d 1068, 1074 (Okla. 1985). This common law tort has been codified by statute. 12 O.S. Sec. 1448 authorizes suit for publicity of a deceased person. 12 O.S. Sec. 1448 provides:

> Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subsection C of this section, shall be liable for any damages sustained by the person or persons injured as a result thereof, and any profits

from the unauthorized use that are attributable to the use shall be taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party or parties in any action under this section shall also be entitled to attorney's fees and costs.

N. This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances: 1. A play, book, magazine, newspaper, musical composition, exhibit, display, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph 4 of this subsection;

It is undisputed the picture in question was published in Harper's Magazine as part of a news photo essay. It has long been recognized that use of a name or picture by the media in connection with a newsworthy item is protected by the First Amendment and is not considered a use for purposes of trade. *Gautier v. Pro-Football*, 107 N.E.2d 485, 488 (N.Y. 1952). This is true irrespective of the fact that such publications are carried on largely, and even primarily, to make a profit. *Neff*, 406 F. Supp. at 861. The court does not see how this photo was being used for commercial purposes. It was part of a news article. Further, the plain language of 12 0.S. Sec. 1448 (N) (1) is clear that this section does not apply to a magazine article. Thus, plaintiffs cannot establish the elements necessary for a cause of action under this section. The picture

to which plaintiffs object was simply not used for commercial purposes.

Plaintiffs also plead a cause of action for publication of private facts. In order to prevail on this theory plaintiffs have to show that defendants' publication of the picture in question was (1) highly offensive to a reasonable person, (2) contained private facts about the plaintiffs' lives, (3) was a public disclosure of private facts and (4) was not of legitimate concern to others. *Hadnot v. Shaw*, 826 P.2d 978, 985 (Okla. 1992) and *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 781 (Okla. 1989). The court finds the plaintiffs cannot establish the elements of this tort. Plaintiffs cannot establish the photo contained private facts about the plaintiffs' lives and plaintiffs cannot establish there was a public disclosure of a private fact. The photo was an accurate depiction of a scene made public. Plaintiffs chose to open the casket of the decedent at a funeral that was open to the public. Over 1200 people viewed the decedent's remains at his funeral. Defendants' picture was just a depiction of this public event. The picture did not reveal any more than the 1200 funeral attendees saw as they were exiting the funeral. The picture of decedent was not a publication of a private fact. It was publication of a public fact: a fact which plaintiffs chose to make public.

Finally, the court also believes the plaintiffs could not establish the final element of this cause of action. The court has found that the decedent's death and subsequent funeral were newsworthy events. As stated previously, decedent was the first Oklahoma National Guard member to be killed since the Korean conflict. Brad Henry, the Governor of the State of Oklahoma, spoke at his funeral. The funeral was open to the public. It is evident it was an important local event by the 1200 people or more who attended the funeral. The local

newspaper called his death and funeral the news story of 2004. It is difficult for the court to see how publication of a picture of this funeral was not a matter of legitimate public concern.

Plaintiffs have also alleged a cause of action for the tort of intrusion upon seclusion. This cause of action is defined as "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Munley v. ISC Financial House, Inc.*, 584 P.2d 1336, 1339 (Okl. 1978). According to the holding in *Munley*, the defendant is only liable when he has intruded into a private place. The court simply fails to see how this was an intrusion into the private life of the plaintiffs. Turnley sought permission to attend the public funeral of decedent. He was granted permission to attend and he took truthful and accurate pictures of what occurred at the event. The funeral was covered by the press and opened to the public. A school auditorium to which the general public is invited is not a private place. Defendants did not intrude upon plaintiffs plans for the funeral or burial. There simply was no intrusion into the private affairs of the plaintiffs.

The court likens this public event to a matter of public record. The United States Supreme Court has stated about matters of public record "the interests of privacy fade when the information involved already appears on the public record," and concluded that "once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975). Further, the Restatement of Torts (Second), Section 252D, which the Oklahoma Supreme Court has adopted, provides

"[t]here is no liability for giving publicity to facts about the plaintiff's life which are matters of public record." *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737, 742 (Okla. 1980). Basically, what Turnley did was give further publicity to a scene which plaintiffs chose to make public. Accordingly, the court fails to see how the plaintiffs can establish the elements for the tort of intrusion upon seclusion. Defendants' motion for summary judgment on all the invasion of privacy claims is hereby granted.

IV. 21 O.S.A. Sec. 839.1

21 O.S.A. 839.1 provides:

> Any person, firm or corporation that uses for the purpose of advertising for the sale of any goods, wares or merchandise, or for the solicitation of patronage by any business enterprise, the name, portrait or picture of any person, without having obtained, prior or subsequent to such use, the consent of such person, or, if such person is a minor, the consent of a parent or guardian, and, if such person is deceased, without the consent of the surviving spouse, personal representatives, or that of a majority of the deceased's adult heirs, is guilty of a misdemeanor.

The statute is clearly limited to photos that are used for the purpose of advertising. While plaintiffs have argued in their second amended complaint that the picture had commercial value, Davidson in his deposition testimony admits the photo is not an advertisement. Thus, it is difficult to see how the plaintiffs, based upon these facts, can proceed on this cause of action. However, case law also appears to preclude their cause of action as well.

There is little Oklahoma case law regarding this statute. However, this statute appears to bepatterned after a similar New York law. In fact, one of the few cases on record interpreting this statute looked to New York law for guidance. *LeFlore v. Reflections of Tulsa, Inc.*, 708 P.2d 1068, 1074 (Okla. 1985). A New York court stated "[w]e have made clear that these sections do not apply to reports of newsworthy events or matters of public interest. This is because a newsworthy article is not deemed produced for the purposes of advertising or trade." *Messenger ex. Rel. Messengerv. Gruner + Jahr Printing and Publishing*, 94 N.Y. 2d 436, 441 (2001) "The fact that Sports Illustrated is a magazine published for profit does not constitute a 'commercial appropriation of Neff's likeness.' The fact that Neff was photographed in a public place for a newsworthy article, entitles the defendant to the protection of the *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254(1964)." *Neff*, 406 F. Supp. at 861. The photo essay was a news piece regarding a newsworthy event, not done for the purpose of advertising. This is true even though the magazine is designed to make a profit. *Gautier v. Pro-Football*, 107 N.E.2d 485, 488 (N.Y. 1952). It appears this statute is not intended to apply to an article covering a newsworthy event. Accordingly, defendants' motion for summary judgment on 21 O.S. 839.1 is hereby granted.

V. Fraudulent/False Representation

Plaintiffs have alleged that Turnley promised not to take pictures of the open casket. Based upon this promise, they say he was allowed admission into the funeral. Plaintiffs claim that when he took pictures of the open casket and then published them in Harper's Magazine, a fraud had been committed. They believe Turnley used fraudulent

representation to gain admission into the funeral. To recover under the theory of fraudulent representation, plaintiffs must prove:

> (1) the defendant made a material misrepresentation; (2) that it was false; (3) the defendant made the representation knowing it was false or in reckless disregard of the truth; (4) that the defendant made it with the intention that it should be acted upon by the plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that plaintiffs thereby suffered injury. *Sturgeon v. Retherford Publications, Inc.*, 987 P.2d 1218, 1228 (Okla. Civ.App. Div. 1999) (citations omitted).

The court went on to state "[a]ll of these allegations must be proven with a reasonable degree of certainty, and all of them must be found to exist. Obviously, an essential element of this tort is proof of detrimental reliance on the misrepresentation by the person claiming injury." *Sturgeon* at 1228.

As the court states in *Sturgeon*, an essential element of this tort is detrimental reliance on the misrepresentation by the *person claiming the injury*. In the case at bar, plaintiffs claim that Turnley promised Stephens that he would not take a picture of the decedent in the open casket. Plaintiffs allege that based upon this promise made by Turnley to Stephens, Turnley was allowed to attend the funeral. If in fact this promise was made, it is undisputed the promise was made to Stephens. Stephens, not plaintiffs, was the one who relied upon it when admitting Turnley to the funeral. Further, the undisputed facts reveal that Showler did not talk to Turnley until after the funeral and that Davidson has never talked to Turnley. Thus, it is factually impossible for the plaintiffs to

have relied upon a statement by Turnley when admitting him to the funeral.

Plaintiffs argue that Stephens was their representative and acting on their behalf. As such, the false promise by Turnley was in essence made to them. However, the court has found no case law to support this position. The facts are clear that Showler and Davidson did not detrimentally rely on any statement by Turnley. Thus, plaintiffs cannot establish one of the necessary elements for this cause of action. Accordingly, defendants are entitled to summary judgment on plaintiffs' fraudulent/fraudulent representation claim.

VI. Constructive Fraud/Fraud/Deceit

In the fifth cause of action, plaintiffs allege that Turnley's action of promising not to photograph the open casket in order to gain entrance into the funeral constituted constructive fraud, fraud and deceit.

In order to establish constructive fraud plaintiffs must show concealment of a material fact by one who has a duty to disclose. *Varn v. Maloney*, 516 P.2d 1328, 1332 (Okla. 1973). Constructive fraud may be based on either an equitable duty or legal duty. *Faulkenberry v. Kansas City Southern Ry. Co.*, 602 P.2d 203, 206 (Okla. 1979). "Under Oklahoma law, a claim for constructive fraud requires a showing that the defendant owed some form of duty to the plaintiff, such as a fiduciary duty or a duty based upon a confidential relationship or a special relationship of trust." *Buford White Lumber Co. v. Octagon Properties, Ltd.*, 740 F.Supp. 1553, 1570 (W.D.Okla.1989). Black's Law Dictionary (7th Ed.1999) defines a legal duty as "a duty arising by contract or by operation of law; an obligation the breach of which would be a legal wrong." The court does not find that under the facts

set forth here there was either a legal or equitable duty owed by defendants to plaintiffs. There was neither a contractual duty nor was there a relationship of confidence or special trust. In fact, Davidson has never spoken to either of the defendants. Showler's contact with Turnley was after the funeral. Under the facts of this case there also does not appear to be a special relationship of trust. Accordingly, the defendants are entitled to summary judgment on plaintiffs' claim for constructive fraud.

The essential elements of fraud are well settled. The plaintiffs "must show a material false representation, made with knowledge of its falsity or recklessly without knowledge as to its truth or falsity, as a positive assertion, with the intention that it be acted upon by another, who does act in reliance thereon, to his injury." *Varn v. Maloney*, 516 P.2d 1328, 1332 (Okl. 1973). Again, the fraudulent statement if made was not made to plaintiffs but rather was made to Stephens the funeral director. Thus, the plaintiffs cannot establish an essential element of fraud which is, the statement was made to them and they were induced to action by it. Thus, defendants are entitled to summary judgment on plaintiffs' fraud claim.

Plaintiffs have also alleged a cause of action for deceit. The elements for a cause of action for deceit are:

> (1) the defendant made a material misrepresentation; (2) that it was false; (3) the defendant made the representation knowing it was false or in reckless disregard of the truth; (4) that the defendant made it with the intention that it should be acted upon by the plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that plaintiffs thereby suffered injury. All these allegations must be proven with a reasonable

> degree of certainty, and all of them must be found to exist. Obviously, an essential element of this tort is proof of detrimental reliance on the misrepresentation by the person claiming injury. *Sturgeon v. Retherford Publications, Inc.*, 987 P.2d 1218, 1228 (Okla. Civ.App. Div. 1999) (citations omitted).

Once again, plaintiffs cannot maintain an action for deceit because if, in fact, Turnley did promise not to take pictures of the open casket, he made the promise to Stephens, not to plaintiffs. Thus, plaintiffs were not the ones deceived.

In *Cooper v. Parker-Hughey*, 894 P.2d 1096 (Okla.1995), plaintiff sued Dr. Parker-Hughley for fraud/deceit because he alleged that her testimony on the stand at his criminal trial was false. The court noted:

> Title 76 O.S.1981, § 2, permits one damaged by another's deceit to receive damages. It provides:
>
> > 'One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.' Yet this provision permits recovery for one deceived by another. In the case at bar, if Dr. Parker-Hughey did lie on the stand, then she deceived the jury rather than Cooper, and Cooper cannot rely on the deceit practiced upon the jury as deceit practiced upon himself. In addition, the court read this statute to include injury to another where the language unambiguously indicates it

applies only to injury suffered by the one deceived.

Id. at 1100.

This case at bar is very similar to the *Cooper* case. In *Cooper* if the doctor lied it was the jury which was deceived. In the instant case, if Turnley lied it was Stephens who was deceived and not the plaintiffs. Accordingly, the defendants are entitled to an order granting them summary judgment on plaintiffs' deceit claim because they cannot establish they acted upon the deceitful statement of Turnley.

VII. Unjust Enrichment

The term "unjust enrichment" describes a condition resulting from the failure of a party to make restitution in circumstances where it is inequitable. It is a recognized ground for recovery in Oklahoma. "A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another." *Lapkin v. Garland Bloodworth, Inc.*, 23 P.3d 958, 961 (Okla.Civ. App. Div. 2, 2000). Before a party will be entitled to recover for unjust enrichment, however, "there must be enrichment to another coupled with a resulting injustice." *N.C. Corff Partnership, Ltd. v. OXY USA, Inc.*, 929 P.2d 288, 295 (Okl.App. 1996). In the case at bar, the court finds there is no benefit to defendants at the expense of the plaintiffs. The photograph as discussed previously is entitled to First Amendment protection. The court has also found there was no tort associated with either the taking of the photograph or the subsequent publication of the photograph. Thus, there was no harm to plaintiffs that resulted in an unjust enrichment to defendants. Accordingly, the defendants are entitled to

summary judgment on plaintiffs' claims for unjust enrichment.

VIII. Negligent Hiring

In order to establish a cause of action for negligent hiring the plaintiffs must show that there is a (1) relationship of master and servant, and (2) the tortitous act must have been committed while the employee was acting within the scope of employment. *Rodebush v. Oklahoma Nursing Homes, Inc.*, 867 P.2d 1241 (Okla. 1993). In the case at bar, the court has found that no tort was committed. Accordingly, the plaintiffs cannot establish that a tort was committed during the scope of employment. Thus, the defendants are entitled to summary judgment on plaintiffs' negligent hiring/supervision claim.

CONCLUSION

Based on the foregoing reasons, Defendants' Motion for Summary Judgment is hereby granted in its entirety.

IT IS SO ORDERED this 22nd day of December, 2005.

/s/
Frank H. Seay
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 05-CV-178-S

[Filed November 1, 2005]

ROBERT SHOWLER,	)
JOHNNY DAVIDSON, Individually	)
and as Special Administrator of the	)
Estate of Kyle Adam Brinlee,	)
Plaintiffs,	)
	)
vs.	)
	)
HARPER'S MAGAZINE FOUNDATION,	)
PETER TURNLEY, Individually and	)
in his capacity as a Contributing Editor	)
to HARPER'S MAGAZINE,	)
Defendants.	)
	)

ATTORNEY LIEN CLAIMED
SECOND AMENDED COMPLAINT

COMES NOW Plaintiffs, Robert Showler and Johnny Davidson, Individually and as Special Administrator of the Estate of Kyle Adam Brinlee, by and through their attorneys of record, Douglas Stall and Marcus N. Ratcliff, of the law

firm LATHAM, STALL, WAGNER, STEELE & LEHMAN, P.C., Tulsa, Oklahoma, and bring this action against the Defendants for violation of Oklahoma privacy, statutory and common laws. In support of this Second Amended Complaint, Plaintiffs state as follows:

JURISDICTION AND VENUE

1. Plaintiff Robert Showler is a resident of Wagoner, Oklahoma, which is situated in the Eastern District of Oklahoma. Mr. Showler has been damaged as a result of Defendants' wrongful conduct as described herein in the Eastern District of Oklahoma.

2. Plaintiff Johnny Davidson is a resident of Mayes County, Oklahoma. Mr. Davidson brings these claims individually and as Special Administrator of the Estate of Kyle Adam Brinlee for damages sustained as a result of Defendants' wrongful conduct.

3. Defendant Harper's Magazine Foundation ("Harper's") is an Illinois corporation with its principal executive offices located at 666 Broadway, New York, New York, 10012. Harper's conducts business within the Eastern District of Oklahoma and venue is proper pursuant to 28 U.S.C. § 1391(c).

4. Defendant Peter Turnley ("Defendant Turnley") is a resident of New York, New York. Mr. Turnley solicits business within the Eastern District of Oklahoma. Venue is proper pursuant to 28 U.S.C. §1391(a).

5. Diversity of citizenship exists between the Plaintiffs and Defendants pursuant to 28 U.S.C. § 1332. The amount in controversy exceeds $75,000.00.

FACTS

6. Robert Showler is the natural father of Kyle Adam Brinlee a/k/a Kyle Brinlee Showler ("Kyle"), deceased. Kyle's natural mother pre-deceased him.

7. Johnny Davidson is the grandfather of Kyle and Personal Representative of the Estate of Kyle Adam Brinlee.

8. Kyle was deployed to Iraq on or about February 12, 2004, as a member of Detachment 1, Company B, 120th Combat Engineer Battalion. He was a carpentry and masonry specialist who joined the National Guard in April, 2001. On May 11, 2004, Kyle was killed in action when an improvised explosive device detonated near his vehicle in Iraq.

9. Kyle's funeral was scheduled for May 19, 2004. Stephens Memorial Chapel in Pryor, Oklahoma handled the arrangements. Prior to the funeral, the owner and director of Stephens Memorial Chapel, Rick Stephens, received a telephone call from Defendant Turnley. Defendant Turnley requested permission to attend Kyle's funeral. Mr. Stephens stated that Defendant Turnley could attend the funeral and that the press was permitted to photograph and/or videotape the processional. Mr. Stephens unequivocally stated that Plaintiffs would not allow photographs of Kyle Brinlee's open casket to be taken. Mr. Stephens also informed Defendant Turnley that the family did not want the media harassing or making contact with them during the funeral service.

10. Defendant Turnley acknowledged the Plaintiffs' instructions and expressly agreed and promised he would not photograph Kyle's open casket and that he would not make contact with the Plaintiffs during the funeral service.

11. Defendant Turnley induced permission to attend the funeral by falsely representing and promising that he would adhere to the Plaintiffs' instructions.

12. Defendant Turnley attended Kyle's funeral on May 19, 2004 in Pryor, Oklahoma. The actual funeral service was held in the Pryor High School Auditorium. A small section of the auditorium was reserved for the press. Defendant Turnley, was instructed he could not photograph the open casket of Kyle Brinlee. Defendant Turnley, was further instructed not to contact Plaintiffs during the funeral service.

13. Prior to the commencement of the funeral service, Mr. Stephens spoke to Defendant Turnley and again informed him of the family's instructions.

14. Defendant Turnley again agreed to the family's instructions.

15. Plaintiffs were unaware Defendant Turnley photographed the open casket.

16. Harper's publishes a periodical each month. The periodicals are distributed through interstate commerce throughout the United States of America. In August, 2004 Harper's published a photograph of Kyle's remains without the consent of Plaintiffs. Harper's solicited business and sales by placing the following on the cover of the periodical:

THE BEREAVED
Mourning the Dead, in America and Iraq
A Photo Essay by Peter Turnley

17. The Photo Essay commences on page 43 of the August 2004 edition. On page 44, mourners at Kyle's funeral are

shown and the caption reads: "Funeral services in Pryor, Okla., for Army Spc. Kyle A. Brinlee, twenty-one, killed when his convoy struck an improvised explosive device in Al-Asad, Iraq, on May 11, 2004." The Defendants then published a picture of Kyle's remains in his open casket on page 47. The caption reads: "The casket of Spc. Brinlee at funeral services in a high school auditorium in Pryor, Oklahoma."

18. Prior to the publication and distribution of the August 2004 edition, the Defendants promoted the sale of the photo essay entitled **"THE BEREAVED"** and Harper's Magazine through several mediums, including but not limited to, radio, internet, television, print and lecture.

19. Subsequent to the publication and distribution of the August 2004 edition, the Defendants continued to promote the sale of the photo essay **"THE BEREAVED"** and Harper's Magazine through several mediums, including but not limited to, radio, internet, television, print and lecture.

20. For example, Defendant Turnley appeared on the Leonard Lopate radio show on August 5, 2004 and the MSNBC show "Hardball with Chris Matthew" on September 7, 2004 to promote **"THE BEREAVED."** Defendant Turnley discussed the United States of America's Military policy of not releasing any photographs or permitting photographers to take and publish photographs of the remains of United States' soldiers killed in the line of duty. Defendant Turnley not only disregarded the policy of the Military of the United States of America, he also intentionally disregarded the rights and emotions of the Plaintiffs. Defendant Turnley continued to promote the **"THE BEREAVED"** and stated that a photograph of Kyle's remains was depicted in the photo essay.

21. In August 2004, Plaintiff Robert Showler observed the picture of his deceased son's remains in the August edition of Harper's. The photograph has caused and continues to cause Plaintiff Robert Showler severe emotional and mental distress.

22. The photograph has caused and continues to cause Plaintiff Johnny Davidson severe emotional and mental distress.

23. After Plaintiff Robert Showler observed his son's photograph in Harper's magazine, Defendant Turnley sent additional photographs to Plaintiff Showler's home. These photographs also depicted Kyle's remains and have caused additional anger, distress and emotional distress.

FIRST CLAIM FOR RELIEF

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

24. Plaintiffs incorporate by reference paragraphs 1 through 23 as if fully set forth herein.

25. A funeral service is a private religious ceremony and a rite of passage. In complete disregard for this sacred ceremony, Plaintiffs' privacy rights and their feelings and instructions, Defendant Turnley took photographs of Kyle's remains during his funeral.

26. The Defendants then published the photograph of Kyle's remains and distributed it through interstate commerce throughout the United States. The Defendants promoted the sale of the August, 2004 edition of Harper's Magazine through several mediums, including but not limited to, radio, internet, television, print and lecture. The Defendants

received recognition, business, sales and profits from the photo essay **"THE BEREAVED."**

27. The Defendants intentionally and recklessly caused severe emotional distress to Plaintiffs. The Defendants knew the United States Military had a policy of not releasing any photographs or permitting photographers to take and publish photographs of the remains of United States' soldiers killed in the line of duty. In total disregard of not only this policy, but also Plaintiffs' rights and feelings, Defendants published a photograph of Kyle's remains.

28. Kyle's photograph was taken after Defendant Turnley acknowledged Plaintiffs' instructions and expressly agreed and promised he would not photograph Kyle's remains in his open casket. The published photograph depicts the remains of a deceased human being and is emotional, sensational and disturbing. This photograph was published so the Defendants would reap recognition, sales, business and profits.

29. Plaintiffs' were mourning the death of Kyle. It was unbearable for Plaintiffs to see an unauthorized and nationally published photograph of Kyle's remains. Moreover, Plaintiffs were unaware any photographs were taken of Kyle's remains and were further distressed when Defendant Turnley sent additional photographs depicting Kyle's remains to Plaintiff Robert Showler's home.

30. The actions of the Defendants were so extreme and outrageous as to go beyond all bounds of decency and are considered atrocious and utterly intolerable in this society.

31. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs suffered actual damages, including pain

and suffering, attorneys' fees and costs associated with this action in excess of $75,000.00.

32. Defendants' outrageous conduct was reckless, willful, wanton and malicious, thereby entitling Plaintiffs to the recovery of punitive damages against the Defendants.

WHEREFORE, Plaintiffs pray that the Court enter judgment in favor of Plaintiffs and against all Defendants, and award Plaintiffs such actual damages and punitive damages as the jury may award them, including Plaintiffs' costs, reasonable attorneys' fees and interest, together with all further relief this Court deems just and proper.

SECOND CLAIM FOR RELIEF

INVASION OF PRIVACY

33. Plaintiffs incorporate by reference paragraphs 1 through 32 as if fully set forth herein.

34. Defendant Turnley was instructed on more than one occasion that no photographs were to be taken of Kyle's remains in his casket. In disregard of Plaintiffs' common law and statutory privacy rights, and in contravention of Plaintiffs express instructions and Defendants' agreement thereto, the Defendants took multiple photographs depicting Kyle's remains; published said photographs without Plaintiffs' consent; and reaped recognition, sales, business and profits.

35. Defendants' appropriation of Kyle's name and remains at his private funeral service was solely for the Defendants' financial advantage and commercial benefit. The Defendants' used Kyle's name and a photograph of his remains for their own financial gain and recognition in direct violation of

Plaintiffs' instructions that no photographs were permitted during Kyle's funeral service.

36. A funeral service is a private religious ceremony and a rite of passage. In complete disregard for this sacred ceremony, Plaintiffs' privacy rights and their feelings and instructions, Defendant Turnley took photographs of Kyle's remains during his funeral.

37. The publication of the photograph of Kyle's remains is an unreasonable publicity of the private life of Kyle and Plaintiffs. The photograph of Kyle's remains was taken at a private, religious ceremony and without the knowledge or consent of Plaintiffs.

38. The act of photographing Kyle's remains and publishing picture a picture of Kyle's remains was an intrusion upon the solitude and seclusion of Plaintiffs.

39. Kyle's photograph was taken after Defendant Turnley acknowledged Plaintiffs' instructions and expressly agreed and promised he would not photograph Kyle's remains in his casket. The published photograph depicts the remains of a deceased human being and is emotional, sensational and disturbing.

40. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs suffered actual damages, including pain and suffering, attorneys' fees and costs associated with this action in excess of $75,000.00.

41. Defendants' outrageous conduct was willful, wanton and malicious, thereby entitling Plaintiffs to the recovery of punitive damages against the Defendants.

WHEREFORE, Plaintiffs pray that the Court enter judgment in favor of Plaintiffs and against all Defendants, and award Plaintiffs such actual damages and punitive damages as the jury may award Plaintiffs; and award Plaintiffs' their costs, reasonable attorneys' fees and interest, together with all further relief this Court deems just and proper.

THIRD CLAIM FOR RELIEF

VIOLATION OF 21 O.S. § 839.1

42. Plaintiff Johnny Davidson, as the Personal Representative of the Estate of Kyle Adam Brinlee incorporates by reference paragraphs 1 through 41 as if fully set forth herein.

43. The Defendants caused to be published a picture of Kyle's remains and his name for the purpose of advertising; solicitation of patronage for the sale of Harper's Magazine; business; profits; and recognition. The photograph spread was specifically referenced on the cover of the magazine as:

THE BEREAVED
Mourning the Dead, in America and Iraq
A photo Essay by Peter Turnley.

44. Prior to and subsequent to the publication and distribution of the August 2004 edition, Defendants promoted the sale of the photo essay **"THE BEREAVED"** and Harper's Magazine through several mediums, including but not limited to, radio, internet, television, print and lecture.

45. In particular, Defendant Turnley appeared on the Leonard Lopate radio show on August 5, 2004 and the MSNBC show "Hardball with Chris Matthews" on September 7, 2004 to promote **"THE BEREAVED."** Defendant Turnley discussed

the United States Military's policy of not releasing any photographs or permitting photographers to take and publish photographs of the remains of United States' soldiers killed in the line of duty. In total disregard of this policy and Plaintiffs rights and feelings, Defendants continued to promote the **"THE BEREAVED"** and stated that a photograph of Kyle's remains was depicted in the photo essay.

46. Plaintiff was unaware that Defendant Turnley took open casket photographs during Kyle's funeral in direct contravention of Plaintiffs instructions.

47. Plaintiff did not consent to the publication of a photograph of Kyle's remains. In fact, Plaintiff did not have the opportunity to view the photograph and object before publication.

48. Plaintiff, is entitled to bring this cause of action pursuant to 21 O.S. § 839.2 and is further entitled to an award of punitive damages pursuant to 21 O.S. § 839.2.

49. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff suffered actual and exemplary damages, including pain and suffering, attorneys' fees and costs associated with this action in excess of $75,000.00.

WHEREFORE, Plaintiff prays that the Court enter judgment in favor of Plaintiff and against the Defendants, and award Plaintiff actual damages and punitive damages as the jury may award Plaintiff, including Plaintiffs costs, reasonable attorneys' fees and interest, together with all further relief this Court deems just and proper.

FOURTH CLAIM FOR RELIEF

FRAUDULENT/FALSE MISREPRESENTATION

50. Plaintiffs incorporate by reference paragraphs 1 through 49 as if fully set forth herein.

51. Prior to the funeral, the owner and director of Stephens Memorial Chapel, Rick Stephens, received a telephone call from Defendant Turnley. Defendant Turnley requested permission to attend Kyle's funeral. Mr. Stephens stated that Defendant Turnley could attend the funeral and that the press was permitted to photograph and/or videotape the processional. Mr. Stephens unequivocally stated that Plaintiffs would not allow photographs of Kyle Brinlee's open casket to be taken. Mr. Stephens also informed Defendant Turnley that the family did not want the media harassing or making contact with them during the funeral service.

52. Defendant Turnley acknowledged the Plaintiffs' instructions and expressly agreed and promised he would not photograph Kyle's open casket and that he would not make contact with the Plaintiffs during the funeral service.

53. Defendant Turnley induced permission to attend the funeral by falsely representing and promising that he would adhere to Plaintiffs' instructions.

54. Defendant Turnley's fraudulent and false misrepresentations were made to induce permission to attend the funeral by fraudulently and falsely representing and promising that he would adhere to Plaintiffs' wishes.

55. Defendant Turnley attended Kyle's funeral on May 19, 2004 in Pryor, Oklahoma and was again instructed that

photographs of Kyle's remains in his open casket were not permitted. Defendant Turnley was further instructed not to contact Plaintiffs during the funeral service.

56. Defendant Turnley brought a camera to the funeral service with the specific intent of photographing Kyle's remains and the private funeral service.

57. On May 19, 2004, Rick Stephens again spoke with Defendant Turnley and again instructed him of the family's wishes.

58. Defendant Turnley agreed to follow the family's instructions.

59. The false misrepresentation by Defendant Turnley was material because Plaintiffs would not have permitted him to attend Kyle's funeral if they had known that Defendant Turnley planned to take photographs of Kyle's remains during his funeral service.

60. The Defendants obtained the photograph of Kyle's remains through a false representation.

61. As a direct and proximate result of the false misrepresentations perpetrated upon Plaintiffs, Plaintiffs have been proximately damaged in an amount that exceeds $75,000.00 to be determined by a jury.

62. Defendants' conduct was willful, wanton and malicious, thereby entitling Plaintiffs to the recovery of punitive damages against Defendants.

WHEREFORE, Plaintiffs pray that the Court enter judgment in favor of Plaintiffs and against the Defendants,

and award Plaintiffs such actual damages and punitive damages as the jury may award Plaintiffs, and award Plaintiffs their costs, reasonable attorneys' fees and interest, together with all further relief this Court deems just and proper.

FIFTH CLAIM FOR RELIEF

CONSTRUCTIVE FRAUD, FRAUD AND DECEIT

63. Plaintiffs incorporate by reference paragraphs 1 through 62 as if fully set forth herein.

64. Prior to the funeral, the owner and director of Stephens Memorial Chapel, Rick Stephens, received a telephone call from Defendant Turnley. Defendant Turnley requested permission to attend Kyle's funeral. Mr. Stephens stated that Defendant Turnley could attend the funeral and that the press was permitted to photograph and/or videotape the processional. Mr. Stephens unequivocally stated that Plaintiffs would not allow photographs of Kyle Brinlee's open casket to be taken. Mr. Stephens also informed Defendant Turnley that the family did not want the media harassing or making contact with them during the funeral service.

65. Defendant Turnley acknowledged the Plaintiffs' instructions and expressly agreed and promised he would not photograph Kyle's remains in his open casket.

66. Defendant Turnley induced permission to attend the funeral by fraudulently representing and promising that he would adhere to the Plaintiffs' instructions.

67. Defendant Turnley's fraudulent and deceitful representations were made to induce permission to attend the

funeral by fraudulently representing and promising that he would adhere to Plaintiffs' wishes.

68. Defendant Turnley attended Kyle's funeral on May 19, 2004 in Pryor, Oklahoma and was again instructed that photographs of Kyle's remains in his open casket were not permitted.

69. Defendant Turnley brought a camera to the funeral service with the specific intent of photographing Kyle's remains and the private funeral service.

70. The fraudulent promises made by Defendant Turnley were material because Plaintiffs would not have permitted him to attend Kyle's funeral if they had known that Defendants planned to take and publish photographs of Kyle's remains during his funeral service.

71. The Defendants obtained the photograph of Kyle's remains through fraud.

72. The actions of Defendants constitute constructive fraud, fraud and deceit and Plaintiffs have been directly harmed by the fraudulent and deceitful actions of the Defendants.

73. The fraudulent actions of Defendants resulted in an economic gain for the Defendants to the detriment of Plaintiffs as to constitute constructive fraud.

74. As a direct and proximate result of the fraud perpetrated upon Plaintiffs, Plaintiffs have been proximately damaged in an amount to he determined by a jury.

75. Defendants' conduct was willful, wanton and malicious, thereby entitling Plaintiffs to the recovery of punitive damages against Defendants.

WHEREFORE, Plaintiffs pray that the Court enter judgment in favor of Plaintiffs and against the Defendants, and award Plaintiffs such actual damages and punitive damages as the jury may award Plaintiffs and award Plaintiffs their costs, reasonable attorneys' fees and interest, together with all further relief this Court deems just and proper.

SIXTH CLAIM FOR RELIEF

UNJUST ENRICHMENT

76. Plaintiffs incorporate by reference paragraphs 1 through 75 as if fully set forth herein.

77. The Defendants have realized financial gains, profits, business, sales and recognition through fraud, deceit and misrepresentations perpetrated upon Plaintiffs.

78. Defendant Turnley directly violated the wishes of Plaintiffs and Kyle's family by taking photographs of Kyle's remains during his funeral service for the purpose of publishing the photograph for the Defendants' financial gain, profit, business, sales and recognition.

79. Plaintiffs have been and continue to be directly harmed by the Defendants' fraudulent actions.

80. The Defendants have been unjustly enriched by realizing financial gains, profits, business, sales and recognition through fraud, deceit and misrepresentations they committed against Plaintiffs.

WHEREFORE, Plaintiffs pray that the Court enter judgment in favor of Plaintiffs and against the Defendants, and award Plaintiffs such actual damages and punitive damages as the jury may award Plaintiffs and also award Plaintiffs their costs, reasonable attorneys' fees and interest, together with all further relief this Court deems just and proper.

SEVENTH CLAIM FOR RELIEF

NEGLIGENT HIRING, RETENTION AND SUPERVISION

81. Plaintiffs incorporate by reference paragraphs 1 through 80 as if fully set forth herein.

82. Upon information and belief, Harper's had or should have had prior knowledge and/or was on notice of Defendant Turnley's propensity to obtain and publish controversial and objectionable photographs.

83. Harper's had a duty to the Plaintiffs to prevent the reasonably foreseeable harm caused by their agent. Harper's breached their duty by retaining, supervising and permitting Mr. Turnley to submit the photograph depicting Kyle's remains after Defendant Turnley promised not to do so.

84. Harper's further breached their duty by failing to determine whether Plaintiffs consented to the publication of the photograph of Kyle's remains. Harper's knew or should have known that the United States Military had a policy of not releasing any photographs or permitting photographers to take and publish photographs of the remains of United States' soldiers killed in the line of duty. In total disregard of not

only this policy, but also Plaintiffs' rights and feelings, Harper's published the photograph of Kyle's remains.

85. Harper''s knew or should have known that photographs of Kyle's remains were not allowed and that Defendant Turnley acknowledged Plaintiffs' instructions and expressly agreed and promised he would not photograph Kyle's remains.

86. Harper's knew or should have known that Defendant Turnley induced permission to attend the funeral by falsely representing and promising that he would adhere to the Plaintiffs' instructions.

87. Harper's knew or should have known that Defendant Turnley's false misrepresentations were made to induce permission to attend the funeral by fraudulently and falsely representing and promising that he would adhere to the Plaintiffs' wishes and that Defendant Turnley was instructed on multiple occasions that photographs of Kyle's remains were not allowed.

88. The photograph depicts the remains of a deceased human being and is emotional, sensational and disturbing. Harper's published Kyle's photograph so it would reap recognition, sales, business and profits.

89. As a direct and proximate result of Harper's negligence, Plaintiffs have been damaged in an amount to be determined at trial.

90. Harper's prior knowledge and notice of Mr. Turnley's practice of obtaining and publishing photographs that are so extreme and outrageous as to go beyond all bounds of decency, which are considered atrocious and utterly

intolerable in this society, thereby entitles Plaintiffs to recover punitive damages against the Defendants.

WHEREFORE, Plaintiffs pray that the Court enter judgment in favor of Plaintiffs and against the Defendants, and award Plaintiffs such actual damages and punitive damages as the jury may award Plaintiffs, and also award Plaintiffs their costs, reasonable attorneys' fees and interest, together with all further relief this Court deems just and proper.

DAMAGES

91. Plaintiffs incorporate by reference paragraphs 1 through 90 as if fully set forth herein.

92. As to all Claims herein above, and as a proximate cause of Defendants' wrongful conduct, Plaintiffs have suffered emotional distress, pain and suffering, and other damages. As to all Claims herein above, Plaintiffs request all actual, compensatory, and statutory damages, including attorneys' fees, costs and prejudgment and post judgment interest.

93. That the wrongful acts of the Defendants were characterized by such outrageous conduct, aggravation, willfulness, wantonness, malice, gross negligence, recklessness, oppression, insult, or gross fraud as to entitle Plaintiffs to an award of punitive damages.

94. The acts, omissions and other conduct of Defendants herein were deliberate, willful, wanton and malicious and/or were reckless and were made with complete disregard for the welfare of Plaintiffs. Under the circumstances, the Defendants' conduct was so outrageous as to shock the conscience.

95. By reason of the outrageous, willful and wanton conduct of Defendants as alleged herein, Plaintiffs are entitled to recover punitive damages in an amount sufficient to punish and deter the Defendants and others similarly situated from committing the same wrongful acts. Plaintiffs thus request punitive damages as to all Counts herein above.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand Judgment in their favor and against the Defendants jointly and severally as follows:

(a) for actual, statutory, and compensatory damages in an amount to be determined by the jury;

(b) punitive damages in an amount to be determined by the jury;

(c) costs of suit;

(d) reasonable attorneys' fees and expert witness fees;

(e) pre-judgment and post-judgment interest; and

(f) such other and further relief as the Court deems just and proper under the circumstances.

PLAINTIFFS DEMAND A TRIAL BY JURY.

Respectfully submitted,

LATHAM, STALL,
WAGNER, STEELE

& LEHMAN, P.C.

/s/_____
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ATTORNEYS FOR THE PLAINTIFFS

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 05-CV-178-S

[Filed November 14, 2005]

ROBERT SHOWLER, JOHNNY DAVIDSON, Individually and as Special Administrator Of the Estate of Kyle Adam Brinlee,
Plaintiffs,

vs.

HARPER'S MAGAZINE FOUNDATION, PETER Turnley Individually and in his capacity as a Contributing Editor to HARPER'S MAGAZINE,
Defendants.

ANSWER OF DEFENDANTS HARPER'S MAGAZINE FOUNDATION AND PETER TURNLEY TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendants Harper's Magazine Foundation ("Harper's) and Peter Turnley ("Turnley"), for their Answer to Plaintiffs' Second Amended Complaint deny each and every allegation

therein contained except as may hereinafter be admitted. By way of their further Answer, Defendants allege and state as follows:

JURISDICTION

1. Upon information and belief, Defendants admit Plaintiff Robert Showler is a resident of Wagoner, Oklahoma. Defendants admit that Wagoner, Oklahoma is situated in the Eastern District of Oklahoma. Defendants deny the remaining allegations in Paragraph 1 of the Second Amended Complaint.

2. Upon information and belief, Defendants admit Plaintiff Johnny Davidson is a resident of Mayes County, Oklahoma. Upon information and belief, Defendants admit that Johnny Davidson has been appointed Personal Representative of the Estate of Kyle Adam Brinlee, deceased. Defendants deny the remaining allegations in Paragraph 2 of the Second Amended Complaint.

3. Defendants admit the allegations in Paragraph 3 of the Second Amended Complaint.

4. Defendants admit that, when not traveling in connection with his profession, Turnley resides in New York, New York. Defendants admit that he took photographs within the Eastern District of Oklahoma but denies that he solicits business therein.

5. Defendants admit that a diversity of citizenship exists between the Plaintiff and Defendant but denies that the amount in controversy exceeds $75,000.

FACTS

6. Upon information and belief, Defendants admit that Robert Showler is the natural father of Kyle Brinlee Showler ("Sgt. Brinlee") and that Sgt. Brinlee's natural mother predeceased him.

7. Upon information and belief, Defendants admit paragraph 7 of the Second Amended Complaint.

8. Upon information and belief, Defendants admit paragraph 8 of the Second Amended Complaint.

9. Defendants admit that Sgt. Brinlee's funeral was scheduled for May 19, 2004, and that Stephens Funeral Home in Pryor, Oklahoma handled the arrangements. Defendants admit that prior to the funeral Defendant Turnley spoke by telephone with Rick Stephens who was identified as the owner and director of Stephens Funeral Home. Before speaking with Mr. Stephens, Defendant Turnley, by telephone, asked a woman at Stephens Funeral Home how to contact Sgt. Brinlee's family in order to request permission to attend and cover Sgt. Brinlee's funeral. The woman with whom Turnley spoke stated the funeral home was handling press arrangements for the funeral and that it was not necessary for Turnley to call Sgt. Brinlee's family. Turnley specifically denies ever being told that the press was to be limited in when, what or how it photographed or videotaped the funeral. Defendants admit that Stephens asked that no attempt be made to interview Sgt. Brinlee's family. The remaining allegations in paragraph 9 are denied.

10. Defendants deny the allegations in Paragraph 10 of the Second Amended Complaint.

11. Defendants deny the allegations in Paragraph 11 of the Second Amended Complaint.

12. Defendant Turnley admits attending Sgt. Brinlee's funeral on May 19, 2004 in Pryor, Oklahoma. Turnley admits that the funeral service was held in the Pryor High School auditorium due to the large number of persons attending and that a section of the auditorium was reserved for the press. Turnley admits Funeral Director Rick Stephens asked that he not attempt to interview Sgt. Brinlee's family during the funeral service. Defendants specifically deny each and every other allegation contained in paragraph 12 of the Second Amended Complaint.

13. Turnley admits that he met with Rick Stephens one time in person before the funeral service and that Stephens asked that he not attempt to interview Sgt. Brinlee's family during the funeral service. Defendants deny the balance of the allegations in paragraph 13 of the Second Amended Complaint.

14. Turnley admits he agreed not to attempt to interview Sgt. Brinlee's family during the funeral service. Defendants deny the balance of the allegations in paragraph 14 of the Second Amended Complaint.

15. Upon information and belief, Defendants admit Sgt. Brinlee's family may not have known the subject of each or any photograph taken buy Turnley before, during or after Sgt. Brinlee's funeral service.

16. Defendants admit that Harper's publishes a monthly magazine distributed throughout the United States and that in August 2004 Harper's published a photo essay which included a photograph of the open casket at Sgt. Brinlee's funeral.

Defendants also admit that the same edition contained on the front cover, among others, the following words: **"THE BEREAVED** Mourning the Dead, in American and Iraq, A Photo Essay by Peter Turnley." The remaining allegations in paragraph 16 are denied.

17. The allegations in paragraph 17 of the Second Amended Complaint are admitted.

18. Defendants admit they promoted the sale of *Harper's Magazine* and the new association of Peter Turnley with Harper's through several media. Defendants deny they "promoted the sale of the photo essay **'THE BEREAVED'"**.

19. Defendants admit they promoted the sale of *Harper's Magazine* and the new association of Peter Turnley with Harper's through several media. Defendants deny they "promoted the sale of the photo essay **'THE BEREAVED'"**.

20. Defendants admit Turnley appeared on the Leonard Lopate radio program on August 5, 2004 and on the MSNBC program *Hardball with Chris Matthews* on September 7, 2004 to discuss THE BEREAVED. Defendants admit that Turnley has discussed the former U.S. military policy of not releasing any photographs or permitting photographers to take and publish photographs of transport or arrival of caskets containing the remains of U.S. soldiers killed in the line of duty. Defendants deny that Turnley disregarded any policy of the U.S. military in his coverage of the funeral of Sgt. Brinlee and further deny that the former U.S. military policy referenced in paragraph 20 of the Plaintiffs' Second Amended Complaint had any application to the funeral of Sgt. Brinlee. The remaining allegations contained in paragraph 21 are denied.

21. Upon information and belief, Plaintiff Showler specifically sought out and purchased a copy of the August 2004 edition of *Harper's Magazine*. Defendants have insufficient information with which to admit or deny the balance of the allegations in paragraph 21.

22. Upon information and belief, Plaintiff Davidson had never seen the photograph of Sgt. Brinlee's open casket until his deposition in this litigation on September 27, 2005. Defendants deny the balance of the allegations in paragraph 22 insofar as they are alleged to have given rise to claims in this lawsuit.

23. Defendants admit that consistent with the promise Defendant Turnley had made to Plaintiff Showler on the day of the funeral, after having been told by Plaintiff Showler's wife to send the photographs, Turnley sent some of his photographs taken in Pryor, Oklahoma in connection with Sgt. Brinlee's services to Plaintiff Showler. The remaining allegations in paragraph 23 are denied.

FIRST CLAIM FOR RELIEF

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

24. Defendants incorporate by reference paragraph 1-23 as if fully set forth herein.

25. Defendants admit Turnley took photographs that included Sgt. Brinlee's casket, opened for viewing by the more than 1,200 attendees at the funeral service but deny that the service was in any way "private" and further deny each and every other allegation contained in paragraph 25 of the Second Amended Complaint.

26. Defendants admit that his photo essay called **"THE BEREAVED** Mourning the Dead, in America and Iraq" **("THE BEREAVED")** contained a photograph that included Sgt. Brinlee's open casket. Attached hereto as Exhibit A is a copy of the said photo essay. The photograph of Sgt. Brinlee is on page 47. Defendants admit that they encouraged the public to read the photo essay in the August 2004 edition of Harpers Magazine. Defendant Turnley admits he was paid by Harper's for all the photographs comprising **THE BEREAVED.** Each and every other allegation in paragraph 26 of the Second Amended Complaint is denied.

27. Defendants deny the allegations in paragraph 27 of the Second Amended Complaint.

28. Defendants deny that any policy of "The United States Military" prohibited, controlled, applied or related to Sgt. Brinlee's funeral or the coverage of said funeral and photographs taken by Turnley or any other member of the press. Defendants also deny the balance of the allegations in paragraph 28 of the Second Amended Complaint.

29. The Defendants admit that the Plaintiffs have mourned the death of Sgt. Brinlee and deny the remaining allegations in paragraph 29 of the Second Amended Complaint.

30. The Defendants deny the allegations in paragraph 30 of the Second Amended Complaint.

31. Defendants deny the allegations in paragraph 31 of the Second Amended Complaint.

32. Defendants deny the allegations in paragraph 32 of the Second Amended Complaint.

SECOND CLAIM FOR RELIEF

INVASION OF PRIVACY

33. Defendants incorporate by reference paragraph 1-32 as if fully set forth herein.

34. Defendants deny the allegations in paragraph 34 of the Second Amended Complaint.

35. Defendants deny the allegations in paragraph 35 of the Second Amended Complaint.

36. Defendants admit that funeral services can be private religious ceremonies and rites of passage. However, Defendants specifically deny that Sgt. Brinlee's funeral was a "private" ceremony. The remaining allegations of paragraph 36 of the Second Amended Complaint are denied.

37. Defendants deny the allegations in paragraph 37 of the Second Amended Complaint.

38. Defendants deny the allegations in paragraph 38 of the Second Amended Complaint.

39. Defendants deny the allegations in paragraph 39 of the Second Amended Complaint.

40. Defendants deny the allegations in paragraph 40 of the Second Amended Complaint.

41. Defendants deny the allegations in paragraph 41 of the Second Amended Complaint.

THIRD CLAIM FOR RELIEF

VIOLATION OF 21 O.S. § 839.1

42. Defendants incorporate by reference paragraphs 1-41 as if fully set forth herein.

43. Except as hereinbefore admitted, the allegations in paragraph 43 of the Second Amended Complaint are denied.

44. Defendants admit they promoted the sale of *Harper's Magazine* and the new association of Peter Turnley with Harper's through several media. Defendants deny they "promoted the sale of the photo essay **'THE BEREAVED'"**.

45. Except as hereinbefore admitted, Defendants deny the allegations in paragraph 45 of the Second Amended Complaint.

46. Defendants deny Turnley took any photographs during Sgt. Brinlee's funeral in direct contravention of Plaintiffs' instructions.

47. Defendants deny the allegations in paragraph 47 of the Second Amended Complaint.

48. Defendants deny the allegations in paragraph 48 of the Second Amended Complaint.

49. Defendants deny the allegations in paragraph 49 of the Second Amended Complaint.

FOURTH CLAIM FOR RELIEF

FRAUDULENT/FALSE MISREPRESENTATION

50. Defendants incorporate by reference paragraphs 1-49 as if fully set forth herein.

51. Except as hereinbefore admitted, Defendants deny the allegations in paragraph 51 of the Second Amended Complaint.

52. Defendant Turnley admits he agreed not to make contact with the Sgt. Brinlee's family during the funeral service and did not make any such contact. Defendants deny the balance of the allegations in paragraph 52 of the Second Amended Complaint.

53. Defendants deny the allegations in paragraph 53 of the Second Amended Complaint.

54. Defendants deny the allegations in paragraph 54 of the Second Amended Complaint.

55. Except as hereinbefore admitted, Defendants deny the allegations in paragraph 55 of the Second Amended Complaint.

56. Defendants admit that Defendant Turnley came to Sgt. Brinlee's funeral service with the specific intent of photographing matters related to the funeral that were open to the public. Defendants deny the balance of the allegations in paragraph 56 of Plaintiffs' Second Amended Complaint.

57. Defendants admit that Turnley and Stephens spoke on May 19, 2004 prior to the start of Sgt. Brinlee's funeral.

Defendants deny the balance of the allegations in paragraph 57 of the Second Amended Complaint.

58. Defendant Turnley agreed not to contact Sgt. Brinlee's family during the funeral. Defendants deny the balance of the allegations in paragraph 58 of the Second Amended Complaint.

59. Defendants deny that Defendant Turnley made any "false misrepresentation" [sic] to or regarding Sgt. Brinlee's family and further deny the balance of the allegations in paragraph 59 of the Second Amended Complaint.

60. Defendants deny the allegations in paragraph 60 of the Second Amended Complaint.

61. Defendants deny the allegations in paragraph 61 of the Second Amended Complaint.

62. Defendants deny the allegations in paragraph 62 of the Second Amended Complaint.

FIFTH CLAIM FOR RELIEF

CONSTRUCTIVE FRAUD, FRAUD AND DECEIT

63. Defendants incorporate by reference paragraphs 1-62 as if fully set forth herein.

64. Except as hereinbefore admitted, Defendants deny the allegations in paragraph 64 of the Second Amended Complaint.

65. Defendants deny the allegations in paragraph 65 of the Second Amended Complaint.

66. Defendants deny the allegations in paragraph 66 of the Second Amended Complaint.

67. Defendants deny the allegations in paragraph 67 of the Second Amended Complaint.

68. Except as hereinbefore admitted, Defendants deny the allegations in paragraph 68 of the Second Amended Complaint.

69. Except as hereinbefore admitted, Defendants deny the allegations in paragraph 69 of the Second Amended Complaint.

70. Defendants deny that Defendant Turnley made any "fraudulent promises" to or regarding Sgt. Brinlee's family and further deny the balance of the allegations in paragraph 70 of the Second Amended Complaint.

71. Defendants deny the allegations in paragraph 71 of the Second Amended Complaint.

72. Defendants deny the allegations in paragraph 72 of the Second Amended Complaint.

73. Defendants deny the allegations in paragraph 73 of the Second Amended Complaint.

74. Defendants deny the allegations in paragraph 74 of the Second Amended Complaint.

75. Defendants deny the allegations in paragraph 75 of the Second AmendedComplaint.

SIXTH CLAIM FOR RELIEF

UNJUST ENRICHMENT

76. Defendants incorporate by reference paragraphs 1-75 as if fully set forth herein.

77. Complaint Defendants deny the allegations in paragraph 77 of the Second Amended Complaint.

78. Defendants deny the allegations in paragraph 78 of the Second Amended Complaint.

79. Defendants deny the allegations in paragraph 79 of the Second Amended Complaint.

80. Defendants deny the allegations in paragraph 80 of the Second Amended Complaint.

SEVENTH CLAIM FOR RELIEF AGAINST HARPER'S NEGLIGENT HIRING, RETENTION AND SUPERVISION

81. Defendants incorporate by reference paragraphs 1-80 as if fully set forth herein.

82. Defendants deny the allegations in paragraph 82 of the Second Amended Complaint.

83. Defendants deny the allegations in paragraph 83 of the Second Amended Complaint.

84. Defendants deny the allegations in paragraph 84 of the Second Amended Complaint.

85. Defendants deny the allegations in paragraph 85 of the Second Amended Complaint.

86. Defendants deny the allegations in paragraph 86 of the Second Amended Complaint.

87. Defendants deny the allegations in paragraph 87 of the Second Amended Complaint.

88. Defendants deny the allegations in paragraph 88 of the Second Amended Complaint.

89. Defendants deny the allegations in paragraph 89 of the Second Amended Complaint.

90. Defendants deny the allegations in paragraph 90 of the Second Amended Complaint.

DAMAGES

91. Defendants incorporate by reference paragraphs 1-90 as if fully set forth herein.

92. Defendants deny the allegations in paragraph 92 of the Second Amended Complaint.

93. Defendants deny the allegations in paragraph 93 of the Second Amended Complaint.

94. Defendants deny the allegations in paragraph 94 of the Second Amended Complaint.

95. Defendants deny the allegations in paragraph 95 of the Second Amended Complaint.

AFFIRMATIVE DEFENSES

1. **Privilege** - Under the First and Fourteenth Amendments to the United States Constitution, the actions complained of in the Second Amended Complaint are privileged and hence not actionable as to Defendants Harper's and Turnley.

2. **Waiver** - By conducting a public funeral at a public high school attended by Oklahoma's Governor, other dignitaries and members of the public and by allowing a place for the press, the Plaintiffs waived any claim that the funeral was "private" and hence even if any of the allegations of the Second Amended Complaint are accurate, the Plaintiffs have waived any claim to pursue their theories of relief.

3. **Estoppel** - Because the Plaintiffs were clearly aware that Defendant Turnley, as a member of the press, was permitted to attend the funeral and take photographs, they are estopped from pursuing any cause of action against Defendants Harper's and Turnley.

WHEREFORE, PREMISES CONSIDERED, Defendants Harper's Magazine Foundation and Peter Turnley pray that they be awarded judgment on Plaintiffs' Second Amended Complaint, for their costs of this action including a reasonable attorneys fee and for such other and further relief as the Court may deem proper.

Respectfully submitted,

/s/

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Attorneys for Defendants Peter Turnley and Harper's Magazine Foundation

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 05-CV-178-S

[Filed November 14, 2005]

ROBERT SHOWLER, JOHNNY DAVIDSON, Individually and as Special Administrator Of the Estate of Kyle Adam Brinlee, Plaintiffs,	)
vs.	)
HARPER'S MAGAZINE FOUNDATION. PETER Turnley Individually and in his capacity as a Contributing Editor to HARPER'S MAGAZINE, Defendants.	)

MOTION FOR SUMMARY JUDGMENT ON THE SECOND AMENDED COMPLAINT

Pursuant to the Federal Rules of Civil Procedure 56, Defendants Harper's Magazine Foundation and Peter Turnley move for summary judgment on the Second Amended Complaint filed herein on November 1, 2005.

Defendants previously filed for Summary Judgment on October 31, the last day to file dispositive motions. This original summary judgment motion has been overtaken by subsequent events. On October 31, the Court granted Plaintiffs' motion to file a second amended complaint and extended the Dispositive Motion deadline to November 10. Consistent with the October 31st Order, Plaintiffs filed a Second Amended Complaint November 1. The Second Amended Complaint, *inter alia,* omitted a negligence claim and, in response to a Rule 11 safe harbor letter, 22 false factual allegations contained in the First Amended Complaint. Thus, this present motion for summary judgment substitutes for the October 31 summary judgment motion and addresses Plaintiffs' allegations and claims as now being asserted.

Consistent with EDOK LR 7.1(B), the Defendants separately submit a brief in support of their motion.

Respectfully submitted,

/s/
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Attorneys for Defendants Peter Turnley
and Harper's Magazine Foundation

CERTIFICATE OF MAILING

The undersigned hereby certificates that a true and correct copy of the above and foregoing document was mailed November 10, 2005, with postage prepaid to:

Douglas Stall, Esq.
Marcus Ratcliff, Esq.
Latham, Stall, Wagner, Steele & Lehman, P.C.
1800 S. Baltimore, Ste. 500
Tulsa, OK 74119

/s/
S. Douglas Dodd

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 05-CV-178-S

[Filed November 14, 2005]

ROBERT SHOWLER, JOHNNY DAVIDSON, Individually and as Special Administrator of the Estate of Kyle Adam Brinlee, Plaintiffs,	)
vs.	)
HARPER'S MAGAZINE FOUNDATION, PETER Turnley Individually and in his capacity as a Contributing Editor to HARPER'S MAGAZINE, Defendants.	)

BRIEF IN SUPPORT OF DEPENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND AMENDED COMPLAINT

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November 10, 2005

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND AMENDED COMPLAINT

Defendants Harper's Magazine Foundation ("Harper's") and Peter Turnley ("Turnley") submit the following brief in support of their Motion for Summary Judgment on the Second Amended Complaint filed by Plaintiffs Robert Showler ("Showler") and Johnny Davidson ("Davidson").

INTRODUCTION

Kyle Adam Brinlee ("Sgt. Brinlee") was a carpentry and masonry specialist in the Oklahoma Army National Guard. Brinlee was killed in action in Iraq on May 11, 2004. Sgt. Brinlee's body was flown back to the United States where a funeral service was conducted at the Pryor High School Auditorium. Showler is Sgt. Brinlee's biological father.[1] Davidson is Sgt. Brinlee's maternal grandfather. At the specific instruction of Showler and Davidson, Sgt. Brinlee's casket was opened for three days prior to the funeral and at the close of the funeral service as the thousands in attendance filed by. Turnley, a veteran international freelance photojournalist on assignment from Harper's took a photograph of Sgt. Brinlee's open casket at the end of the funeral service.

After the graveside service ended, Turnley approached Showler, expressed his condolences, and offered to send Showler photographs of the funeral. Showler accepted the offer and gave Turnley his address. In June, Showler called Harper's to learn when Turnley's photos would be published. When told that they would be published in August, Showler waited until August 4 and then went to the local Barnes & Noble and picked up a copy of the Harper's edition off the stand. Showler claims that when he opened the magazine and saw Turnley's photograph of Sgt. Brinlee's open casket (hereafter "Turnley Photo"), he was severely distressed.

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[1] Showler is not Sgt. Brinlee's legal father. Showler's parental rights were terminated during an adoption proceeding February 3, 1993. *Showlev Depo.* Exh. 19. App. at 1.

Until his deposition in this lawsuit, Davidson had not even seen the Turnley Photo. Showler and Davidson brought this action seeking damages allegedly caused by their reactions to the Turnley Photo. The Turnley Photo is the lynchpin to all of the Plaintiffs' claims. A copy is attached hereto. App. at 2.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The news media, including reporters and photojournalists from Pryor, Tulsa and Oklahoma City, Oklahoma, covered the death of Sgt. Brinlee in Iraq and publicized his upcoming funeral. *See,* news stories from *The Daily Times, The Tulsa World, The Daily Oklahoman,* KTUL-TV, KOTV and KJRH television. App. at **3.**

2. Sgt. Brinlee was the first Oklahoma National Guardsman killed in combat since the Korean war in the early 1950s. *The Daily Times,* May 17, 2004. App. at 4. *Davidson Depo. p. 33, l. 11-17.* App. at 5.

3. Sgt. Brinlee's funeral was scheduled for May 19. 2004 and was arranged by Stephens Memorial Chapel in Pryor, Oklahoma. *Showler Depo. p. 29, l. 16 — p. 30, l. 12.* App. at 5.

4. The funeral was planned by family members including Plaintiffs Showler and Davidson with the assistance of Rick Stephens ("Stephens") of Stephens Memorial Chapel. *Showler Depo. p. 30, l. 13 — p. 31, l. 9.* App. at 5

5. Showler and Davidson decided that Sgt. Brinlee's casket should be open for public viewing mainly because Sgt. Brinlee's body looked "just fine." *Showler Depo. p. 41, l. 3— p. 42, l. 2.* App. at 5.

6. Sgt. Brinlee's open casket was made available for public viewing at the funeral home for three days prior to the funeral. *Showler Depo. p. 34, ll 1-22.* App. at 5.

7. Showler viewed Sgt. Brinlee's open casket at the funeral home. *Showler Depo. p.34, ll 12-22.* App. at *5.*

8. Stephens Memorial Chapel handled press arrangements and inquiries regarding the funeral. *Stephens Depo. p. 31, l. 8-21; Davidson Depo. p. 37, l. 21— p. 38, l. 3; p. 53, l. 1-8.* App. at 5.

9. Stephens designated an area of the Pryor High School Auditorium for the press at the May 19, 2004 funeral. *Stephens Depo. p. 54, ll 4-11.* App. at *5.*

10. Oklahoma Governor Brad Henry attended and spoke at Sgt. Brinlee's funeral at Showler's request. *Stephens Depo. p. 43, ll 10-23; Showler Depo. p. 37, ll 18-20; p. 134, 11 6-14; Davidson Depo. p. 33, 1. 18, -p. 34, l. 2; p. 76, l. 23 -p. 77, l.7.* App. at 5. *The Daily Times, May 20, 2004; The Tulsa World, May 20, 2004, The Daily Oklahoman. May 20, 2004; KOTV news story, May 19, 2004; KTUL news story, May 19, 2004; KJRH news story, May 19, 2004, KOKI news story, May 19, 2004.* App. at *6.*

11. More than 1,200 persons attended the funeral of Sgt. Brinlee at the Pryor High School auditorium on May 19, 2004. Funeral Sign-in sheets, PTF 0237-0280. App. at 7.

12. None of the more than 1,200 persons arriving at the Pryor High School auditorium on May 19, 2004 to attend Sgt. Brinlee's funeral, including members of the press, were turned away or excluded. *Stephens Depo. p. 29, l. 23—p. 30, l. 8.* App. at *5.*

13. According to *The Daily Times* of Pryor Creek, Oklahoma's "[f]riends, family, admirers, classmates, military personnel, acquaintances and strangers filled the Pryor High School Auditorium to capacity." *The Daily Times,* May 20, 2004. App. at 6.

14. "Pool" television coverage of Sgt. Brinlee's funeral was permitted by Sgt. Brinlee's family. Videographer Jake Shannon of KOTV in Tulsa provided live video of Sgt. Brinlee's funeral for four Tulsa television news stations' coverage of the funeral. *Stephens Depo. p.54, l. 20 — p. 55, l. 25; Davidson Depo. p. 38, ll 4-15.* App. at 5.

15. During the May 19, 2004 funeral Sgt. Brinlee was posthumously awarded the Purple Heart, the Bronze Star and was promoted to the rank of Sergeant. *The Daily Times, May 20, 2004; The Tulsa World, May 20, 2004, The Daily Oklahoman. May 20, 2004; KOTV news story, May 19, 2004; KTUL news story, May 19, 2004; KJRH news story, May 19, 2004, KOKI news story, May 19, 2004.* App. at 6.

16. Television news stories about Sgt. Brinlee's funeral using "pool" video from the funeral service were broadcast by television stations KOTV, KTUL, KJRH and KOKI in Tulsa,
Oklahoma. Scripts from television news stories. App. at 8.

17. Members of the press present in the auditorium press section and covering the funeral of Sgt. Brinlee on May 19, 2004 included Dan Anderson and Kathy Parker of *The Daily Times* of Pryor Creek, Oklahoma, Susan Ogrocki of the *Associated Press,* James Gibbard of the *Tulsa World,* David McDaniel of *The Daily Oklahoman* and Defendant Peter Turnley, Contributing Editor and Photojournalist for

Defendant *Harper's Magazine*. Stories and photographs with bylines. App. at 9.

18. At the end of the funeral service, with the consent of and at the direction of the Plaintiffs, Sgt. Brinlee's casket was moved from the front of the Pryor High School auditorium to the center rear exit doors adjacent to the press area. The casket was opened for viewing by employees of Stephens Memorial Chapel. Lt. Col. John Lyle and an unidentified Pryor police officer stood at the head of the open casket as the 1,200 or more attendees exited the auditorium, most filing directly past the open casket. *Stephens Depo. p. 96, ll 7-22.* App. at 5.

19. After the crowd had exited the auditorium, Showler again viewed Kyle's open casket. *Showler Depo. p. 47, l. 12 —p. 48, l. 7.* App. at 5.

20. After Sgt. Brinlee's graveside rites, Turnley approached Showler, introduced himself, expressed his condolences and offered to send him copies of some of the photos he had taken of the funeral. *Showler Depo. p 38, l. 2—p. 39, l. 9; Turnley Depo. p. 17, l. 10 — p. 18, l. 4.* App. at 5.

21. Showler accepted Turnley's offer and demonstrated his acceptance, *inter alia*, by giving Turnley his address. *Showler Depo. p. 39, ll 2-9.* App. at 5.

22. Showler called Harper's in June 2004 asking when Harper's would publish Turnley's story about Sgt. Brinlee's funeral and about the photographs of the funeral that Turnley

promised to send. *Showler Depo. p.* 51, l. 2 — *p. 54, l. 20.*[2] App. at 5.

23. Showler saw the Turdey photograph in Harper's in August of 2004 only because he went to Barnes & Noble specifically for the purpose of viewing Turnley's photographs of the Sgt. Brinlee funeral published in Harper's' August edition. *Showler Depo.* p. 56, l. 10 — p. 57, l. 2. App. at 5.

24. Before Turnley sent his photographs of Sgt. Brinlee's funeral to Showler, Showler's wife confirmed again to Turnley by phone that he should send the photographs and once again gave him Showler's address. *Showler Depo.* p. 55, l. 3 — p. 56, l. 6. App. at 5.

25. Showler knew the Turnley photographs mailed to his house contained photographs of the open casket, but Showler insisted on seeing them anyway. *Showler Depo.* p. 63, l. 16 — p. 64, l. 7. App. at 5.

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[2] Showler testified that his calls to Harper's were to learn when the story would appear in Harper's but he does not recall asking for the photos Turnley promised to mail. However, a contemporaneous Harper's email to Turnley prompted by Showler's calls reflects that on or about June 8, 2004, Harper's received a call from Showler. "He asked about the photo essay and wants to get photographs of the funeral from you if possible." Showler also left his address again. *See,* TUR 86-87 (Turnley's initial disclosures) App. at 10. These emails were discussed during Turnley's deposition *(Turnley Depo. p.* 162, *ll* 1-25. App. at 5) and copies are exhibits to the depositions.

26. Although he visited a "grief counselor" and two family doctors[3] for help in dealing with the grief caused by his son's death, Showler has not sought any professional help for his alleged emotional reaction to Turnley's photograph. *Showler Depo. p. 87, l. 16 — p. 93, l. 7* .[4] App. at 5.

27. Davidson did not see Turnley's photograph of Sgt. Brinlee's open casket until his deposition taken in September 27, 2005. *Davidson Depo.p. 66, l. 18 — p. 67, l. 8: p. 84, l. 18 — p.85, l. 20.*[5] App. at 5.

28. The Turnley photo, published on page 47 of the August 2004 edition of *Harper's* magazine was an accurate and truthful depiction of the image that any member of the public at the funeral saw or could have seen as they exited the Pryor High School Auditorium after the funeral. *Stephens Depo p. 96, l. 7 — p. 97, l. 1.* App. at 5. *"THE BEREAVED"*. App. at 11.

29. The Turnley photo, published by Defendant Harper's magazine shows Oklahoma Governor Brad Henry walking up

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[3] Showler saw "Dr. Bittle" after the funeral but before the August 2004 Harper's edition was published. *Showler Depo. p. 90, ll 1-5.* App. at 5. Showler saw Dr. Combs on May 11, 2005, "the one-year anniversary" of Sgt. Brinlee's death. *Showler Depo. p. 88, 1. 1-22,* App. at 5.

[4] In fact, Showler's immediate reaction to seeing the Turnley photo was not to seek professional help for his alleged distress but to see a lawyer. *Showler Depo. p. 56, l. 10 — p. 58, l. 8.* App. at 5.

[5] In the First Amended Complaint, Plaintiffs alleged Davidson saw the Turnley photograph in August of 2004 and was extremely distressed.

one of the isles from the front of the Pryor High School Auditorium being the first in the line of attendees to exit past Sgt. Brinlee's open casket. *Stephens Depo. p. 93, l. 6-14.* App. at 5. *"THE BEREAVED"*. App. at 11.

30. Sgt. Brinlee's death in Iraq and events surrounding his funeral and burial in Pryor, Oklahoma, were listed in Pryor Creek, Oklahoma's *The Daily Times "2004: Year in Review"*, as the number one story of the "Top 20" stories in the news during 2004. *The Daily Times,* January 3, 2005. App. at 12.

31. Turnley is not a Harper's employee but an independent contractor engaged on a contract basis to produce photo essays. *Turnley Depo. p. 125, l. 10 — p. 130, l. 12;* App. at 5. *Ex. Har.. 63-65.* App. at 13.

STANDARD OF REVIEW

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the pleadings and documentary evidence in the light most favorable to the nonmovant. *Cone* v. *Longmont United Hosp. Ass'n,* 14 F.3d 526, 527-28 (10th Cir. 1994). If defendant draws attention to lack of factual support for essential elements of Plaintiffs' claim, summary judgment may be granted unless plaintiff sets forth facts requiring trial. *See Celotex Corp. v. Catrett,* 477 US. 317 (1986).

United States Supreme Court decisions and their progeny will guide the application of First Amendment protections. In determining whether Defendants are entitled to judgment as a matter of law the Court must then look to applicable state

law.[6] However, "[w]here there is no decision of the state's highest court that has addressed an issue of that state's law" federal courts "must predict how the state's highest court would rule."[7] In attempting to make such a prediction, federal courts are "free to consider all resources available, including decisions of [the state's] courts, other state courts and federal courts, in addition to the general weight and trend of authority."[8]

ARGUMENT & AUTHORITIES

Showler and Davidson make seven claims to recover for alleged emotional damages caused by the Turnley Photo. All seven of Plaintiffs' claims depend on the alleged outrageousness of the Turnley Photo. Because the Turnley Photo is a dignified, respectful image of Sgt. Brinlee exposed to the public by the Plaintiffs, Plaintiffs' claims, regardless of the theory asserted, are without merit.

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[6] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Pehle v. Farm Bureau Life Ins. Co., Inc.*, 397 F.3d 897, 900 (10th Cir. 2005).

[7] *County of Santa Fe, N.M.. v. Public Service Co. of N.M.*, 31 1 F.3d 1031, 1035 (10th Cir. 2002). (citations and quotations omitted).

[8] *Id.* (citations and quotations omitted, alteration in original).

Proposition 1:
Because the Turnley photo was taken at a public event of what was clearly observable by the public, the publication of the photo is protected by The First Amendment

All Plaintiffs' claims are based on injuries alleged to have occurred from viewing Turnley's Photo. The Turnley Photo was taken at a funeral open to the public from an area reserved for the working press in a public auditorium. Under the Undisputed Facts the funeral was neither private nor restricted. (Undisputed Facts 6, 9, 10 & 11).

Published photographs of newsworthy events are given the greatest protection under the First Amendment granting the press broad freedom of access and expression. There is no legal basis to award damages to the plaintiff based on the content of a newsworthy photograph legally obtained in a public forum and published as part of a news photo-essay. Furthermore, "A factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities. The constitutional privilege protects all truthful publications relevant to matters of public interest." Neff v. Times, Inc., 406 F.Supp. 58, 861 (W.D. Pa. 1976)

The United States Supreme Court has established broad First Amendment protections for the press to include lawfully obtained and truthful reports about matters of public interest and importance.

> Our opinion in *New York Times v. Sullivan,* 376 US. 254 (1964), reviewed many of the decisions that settled the 'general proposition that freedom of expression upon public questions is secured by the

> First Amendment.'" *Id.* at 269. *see Roth v. United States,* 354 U.S. 476, 484 (1957); *Bridges v. California,* 314 US. 252, 270 (1941); *Stromberg v. California,* 283 U.S. 359, 369 (1931). Those cases all relied on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open...." [citations omitted].

Bartnicki v. Vopper, 532 US. 514, 534 (2001).

In *Bartnicki,* the Supreme Court found that media broadcasts of an illegally intercepted cell phone conversation were protected because the media defendants did not do anything unlawful and because the phone conversation (about teacher's union labor negotiations) was a matter of a public concern. The *Bartnicki* court noted:

> In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: "The right of privacy does not prohibit any publication of matter which is of public or general interest." The Right to Privacy, 4 Harv. L.Rev. 193, 214 (1890). One of the costs associated with participation in public affairs is an attendant loss of privacy. [emphasis supplied]

Bartnicki, at 534.

The Court also found that:

> "...state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publishing Co.,* 443

> U.S. 97, 102 (1979). More specifically, this Court has repeatedly held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need...of the highest order." *Id.* at 103. *see also, Florida Star* v. *B.J.F.*, 491 US. 524, (1989)... [emphasis supplied]

Id. at 527. *See also, Cox Broadcasting Corp.* v. *Cohn,* 420 US. 469 (1975).

Defendants lawfully obtained and published a newsworthy photograph related to a matter of public significance at a public event and constitutionally may not be punished by permitting Plaintiffs' alleged cause of action to proceed under any theory. This First Amendment protection cannot be avoided by artful pleading. *Jordan v. World Pub. Co.,* 1994 OK CIV APP 30,¶ 13, 872 P.2d 946, 948 (litigant cannot circumvent First Amendment protections "merely by labelling a lawsuit as a negligence action rather than one for libel")" *Zeran* v *Diamond Broadcasting, Inc.,* 203 F.3d 714, 721 (10th Cir. 2000); *Kirschstein* v. *Haynes,* 1990 OK 8,7 30, 788 P.2d 941; *see* also *Hustler Magazine, Inc.* v. *Falwell,* 485 US. 46, 56-57 (1988).

Plaintiffs' claims, based on the content of a lawfully-obtained and accurate news photograph of a public event, if permitted to proceed, would have an impermissible chilling effect on the willingness of journalists and publishers to cover and publish matters of public importance and interest. On First Amendment grounds alone, Defendants are entitled to judgment as a matter of law on all claims.

Proposition 2:
Defendants did not cause the damages alleged by the Plaintiffs

The alleged damage to the Plaintiffs is based on their emotional reactions upon viewing Turnley's photograph of Sgt. Brinlee's open casket published in Harper's Magazine. *See Second Amend. Compl.* ¶¶ *21-22.* It is uncontroverted that Showler affirmatively sought to view Turnley's photographs of Sgt. Brinlee's funeral. Had Showler not done so, he would not have seen the photographs and could not have been damaged as he alleges. The claims as to Davidson are simply false. Although Davidson originally claimed to have been damaged by seeing the Turnley photo in August of 2004 (First Amend Compl. ¶ 23), he has acknowledged under oath that he had never seen it until his September 27.2005 deposition in this case. *Davidson Depo.* p.66-67. App. at 5. In the Second Amended Complaint, Davidson no longer claims to have seen the photo but still claims that the Turnley Photograph "has caused and continues to cause...severe emotional and mental distress." *Id.* ¶ 22.

Although the Turnley Photo was neither unlawful nor outrageous, Showler himself caused whatever damage he claims resulted from viewing it. As the United States Supreme Court has stated, a litigant cannot "be heard to complain about damage inflicted by its own hand." *Pennsylvania v. New Jersey,* 426 US. 660, 664 (1976). As a general rule, a party asserting damage from a tort must establish a causal connection between the damage alleged and the action of the defendants. *See, e.g., Nova Health Sys.* v. *Gandy,* 416 F.3d 1149, 1156 (10th Cir. 2005). ("We hold that Nova has failed to demonstrate the necessary causal connection between its injury and these defendants.") The photographs Turnley mailed to Showler with his consent and those published in

Harper's were photographs of precisely what Showler asked to see and what Showler and those attending the public ceremony had seen in person of their own volition.

A plaintiff cannot maintain an action seeking redress for self-inflicted damage, *i.e.,* Plaintiff has no cause of action where the Defendant has not caused the Plaintiffs' alleged damage. *Steele* v. *Isikoff;* 130 F.Supp. 23, 35 (D.D.C. 2000) (reporter not liable for intentional infliction for violating promise not to use source's name because source "herself proximately caused the harm."); *Cf. Petro-Kim Processing, Inc. v. EPA,* 866 F.2d 433, 438 (D.C. Cir. 1989) ("to the extent that this injury is self-inflicted, it is 'so completely due to the [complainant's] own fault as to break the causal chain'"), *Conn. Student Loan Found. v. Riley,* 948 F.Supp. 156, 159 (D.Conn. 1996) (a plaintiff "cannot manufacture an injury by its own actions").

Proposition 3:
Plaintiffs' cannot prove any of the elements for Intentional Infliction of Emotional Distress

Plaintiffs' first claim is for intentional infliction of emotional distress or "outrage". Plaintiffs claim that Harper's publication of the Turnley Photo caused them severe emotional harm. *Second Amend. Compl.* ¶ 22-23.

The elements of intentional infliction of emotional distress in Oklahoma are: (1) intentional or reckless conduct (2) so outrageous and extreme as to go beyond all possible boundaries of decency, (3) which causes mental distress so severe that no reasonable person could be expected to endure it. *Breeden v. League Serv's Corp.,* 1978 OK 27, 575 P.2d 1374; *Hussain v. Palmer Communications Incorporated,* 60 Fed. Appx. 747, 754 (10th Cir. 2003). Oklahoma law requires

the trial court to determine as a matter of law, if the alleged conduct of the defendant is sufficiently extreme and outrageous, as defined in § 46 of the Restatement (Second) of Torts, to allow recovery. *Breeden,* 1978 OK 27, ¶ 12; *Eddy v. Brown,* 1986 OK 3, ¶ *6,* 715 P.2d 74, 76. "It is also the trial court's initial responsibility to determine whether the stress allegedly suffered by the Plaintiff is severe emotional distress. (citations omitted)." *Zeran* v. *Diamond Broadcasting, Inc.,* 203 F.3d 714, 721 (10th Cir. 2000). Under the Undisputed Facts, Plaintiffs cannot support any of the required elements as a matter of law.

First, Plaintiffs cannot prove that Defendants' conduct was intentional or reckless because, as noted earlier, Showler voluntarily sought to view the photograph and Davidson did not see it. Defendants did not intentionally send Showler or Davidson anything except what Showler asked to see. Sgt. Brinlee's funeral was not a "private" ceremony; Turnley did not know, much less disregard, the feelings of the Plaintiffs; Turnley did not disregard any applicable military policy; Turnley did nothing during the coverage of Sgt. Brinlee's funeral other than the exercise of his journalistic profession as protected by the First Amendment to the United States Constitution. The allegation that Turnley promised not to photograph the open casket is irrelevant. Courts have found that a photograph of a patient at a private psychiatric facility obtained by a trespass "did not remotely approach the required standard" for the tort of outrage. *Howell v. New York Post Co., Inc.,* 612 N.E. 2d 699, 705 (N.Y. 1993). *Howell* is cited in *Miller v. Miller,* 1998 OK 24, 956 P.2d 887, 899 n. 35. Also, photographing "an undercover police officer in a public place and publishing those photographs and the officer's identity in conjunction with a news article" was not "extreme and outrageous conduct" sufficient for outrage tort. *Ross v. Burns,* 612 F.2d 271, 274 (6th Cir. 1980).

Second, under the Undisputed Facts, the photograph was not outrageous or extreme. Plaintiffs' allege that Turnley's Photo is "emotional, sensational and disturbing" because it "depicts the remains of a deceased human being." However, because Sgt. Brinlee in the flag-draped casket looked "just fine," this "depiction" is an image that Showler and Davidson specifically authorized for public viewing. Showler saw the open casket on several occasions and would not have seen the Turnley Photo but for his own efforts. Defendants' respectful photograph[9] of Sgt. Brinlee's open casket and the public funeral scene in the background was neither "outrageous" nor "intolerable" as a matter of law.

Third, Showler has not suffered the severe mental distress required by this tort. Under the Undisputed Facts, Showler has suffered grief from his son's death and seen doctors on two occasions and a counselor for this grief. However, Showler has not sought any professional help for the "extreme distress" he allegedly suffered upon viewing the Turnley Photo. *Daemi* v. *Church's Fried Chicken*, 931 F.2d 1379, 1389 (10th Cir. 1991) (evidence that Defendant's conduct made Plaintiff "literally sick to his stomach" and Plaintiff saw treatment from doctor insufficient to support intentional infliction claim); *Lacy* v. *Cooper Hospital*, 745 F. Supp. 1029, 1036 (D.N.J. 1990) (Defendant's conduct caused Plaintiff to be angry, grieved, stressed, and could not sleep

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[9] In dismissing an outrage claim based on the publication without permission of the Plaintiff's deceased father's photo, the Florida Court noted that Plaintiffs did not claim Defendant "to have displayed grotesque pictures of the deceased's body." *Loft* v. *Fuller*, 408 So. 2d 619, 625 (Fla. Dist. Ct. App. 1982).

but this distress was "not sufficiently severe to allow for recovery" under outrage).

Oklahoma courts have examined the tort of "outrage" involving actions taken by the news media in connection with their reporting and editorial functions. *Gaylord Entm't* v. *Thompson*, 1998 OK 30, 958 P.2d 128; *Wright v. Grove Sun Newspaper Co.*, 1994 OK 37, 873 P.2d 983. In *Gaylord Entertainment, supra,* trial lawyers sued two newspapers for intentional infliction of emotional distress because of news stories and editorials about the "tort-reform" efforts of the plaintiff Citizens Against Lawsuit Abuse, Inc. The Oklahoma Supreme Court found "[T]he offensive publications in this case scenario are both *protected* and *nondefamatory*. These two characteristics, when combined, take the tendered...conduct out of that category which makes it actionable under the tort-of-outrage rubric." *Id.* at ¶ 46.

In *Grove Sun,* the plaintiff sued the newspaper for libel and "outrage" in connection with the newspaper's publication of a transcript of a conversation between two undercover narcotics officers. In considering the Plaintiffs' "outrage" claim, the Court found that "[s]ince fair and accurate media coverage of public occasions is in the highest and best interest of the public, Grove Sun's conduct cannot be treated as actionable under this [tort of outrage] rubric." *Grove Sun,* 1994 OK 37, ¶ 11. It is undisputed that Sgt. Brinlee's funeral was just such a public occasion and was without question a newsworthy event. Therefore, Turnley's coverage of the funeral and Harper's publication of the resulting photo-essay is protected by the First Amendment to the United States Constitution and by both federal and state case law.

The Texas Court of Appeals addressed questions remarkably similar to the instant case in *Cox Texas*

Newspapers, L.P. v. Wootten, 59 S.W.3d 717, (Tex. Ct. App. 2001). In *Cox,* Wootten sued a newspaper that published a photograph of his dead wife in her casket, alleging among other things, emotional distress. The Texas court examined Wootten's claims against the standards for intentional infliction of emotional distress. Wootten alleged that after his wife Barbara died, he told the funeral service not to apply any make-up to his deceased wife's face and not to open the casket for anyone, as his wife did not want her body to be viewed. When a reporter for the defendant *Austin American-Statesman* interviewed the funeral home owner in a story about funeral home prices, the funeral home allowed the reporter and his photographer access to every aspect of the funeral home. The article published in the *Austin American-Statesman* included a picture of a woman in an open casket. The plaintiff recognized his wife as the body lying in the open casket and sued both the funeral service and the newspaper. The Texas Court of Appeals denied Wootten's claim for emotional distress stating:

> Even if we construe the plaintiffs pleadings liberally so as to include intentional conduct, Wootten's allegations still fail as a matter of law because the *Statesman's* conduct cannot be said to be so outrageous as to be totally intolerable in a civilized society. [citation omitted] Taking pictures of a dead body is not intolerable; in fact, such pictures are frequently taken in a variety of situations. Publication of the rather dignified, albeit unauthorized, pictures of Barbara Wootten's body was not extreme and outraneous by the *Statesman*. [emphasis supplied]

Id. at 724.

Proposition 4:
Defendants' did not invade Plaintiffs' Privacy under any theory.

Plaintiffs' second claim is for an invasion of privacy. Oklahoma recognizes four invasion of privacy torts. *McCormack v. Oklahoma Pub. Co.*, 1980 OK 98, 613 P.2d 737. Plaintiffs attempt to allege three of these discrete categories under their second claim: "Appropriation," *Second Amend. Compl.* ¶ 35 ("Defendants' appropriation of Kyle's name and remains at his funeral service..."); "Publication of Private Facts" *Id.* ¶ 36 ("publication of the photograph of Kyle's remains is an unreasonable publicity of the private life of Kyle and Plaintiffs."; and "Intrusion upon Seclusion" *Id.* ¶ 38 ("The act of photographing Kyle's remains and publishing a picture of Kyle's remains was an intrusion upon the solicitude and seclusion of Plaintiffs.").

"Appropriation" is available only when another's name or likeness is appropriated for a commercial purpose. *LeFlove v. Reflections of Tulsa, Inc.*, 1985 OK 72, ¶ 23, 708 P.2d 1068. This statutory law (21 O.S. ¶¶ 839.1-839.2) has subsequently been expanded by the legislature. 12 O.S. § 1448 authorizes suit for publicity of a deceased person and § 1449 authorizes suit by a living person. One may not maintain an action for appropriation based on an appropriation of someone else's image except under the circumstances set forth in § 1448 which are not alleged or provable here. Showler originally sought damages for appropriation under 12 O.S. § 1449, but abandoned this claim when Defendants pointed out, *inter alia*, that Showler is not, as he alleged, "the surviving heir" of Sgt. Brinlee and that the statutes required proof that the deceased photograph had "commercial value." 12 O.S. § 1448(G). Because they cannot prove the elements of Section 1448 and

because the Turnley Photo was not used in an advertisement, Plaintiffs' appropriation claim has no merit.

Under the Undisputed Facts, a "private facts" tort cannot be maintained by Plaintiffs. The Turnley Photo is not of Showler or Davidson and is not of a "private" matter. The elements of this tort are publicity about a person that is "highly offensive to a reasonable person" and "not of legitimate concern to the public." *Munley v. ISC Fin. House, Inc.*, 1978 OK 123, ¶ 13 , 584 P.2d 1336, 1339; *Guinn v. Church of Christ of Collinsville,* 1989 OK 8, 775 P.2d 766. The Turnley photo is of an image Showler and Davidson displayed to the public. "[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye." RESTATEMENT (SECOND) OFTORTS, § 652D cmt. a (1964).

The elements for intrusion in Oklahoma are (1) intentional intrusion upon (2) the solitude, seclusion or private affairs of another (3) in a manner that would be highly offensive to a reasonable person. *Munley*, 1978 OK 123. ¶ 12. Under the Undisputed Facts, Plaintiffs cannot meet the elements required to state a claim for intrusion. **First,** Turnley's taking of a photograph of Sgt. Brinlee cannot invade the privacy of Showler and Davidson. The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded." *Colbert* v. *World Pub. Co.*, 1987 OK 166,¶4, 747 P.2d 286, 293; *see* also *Loft,* 408 So. 2d at 621 ("A cause of action for invasion of the common law right of privacy is strictly personal and may be asserted only by the person who is the subject of the challenged publication."). One may not base an intrusion claim on an invasion of someone else's privacy even if the someone is a son. *Nelson* v *Times,* 373 A.2d 1221, 1223 (Me. 1977)

(mother's privacy not invaded by unauthorized publication of son's photograph).

Second, Showler and Davidson did not know that Turnley was taking the photograph and hence could not have been harmed by the alleged intrusion. "Unlike other types of invasion of privacy, intrusion does not involve as one of its essential elements the publication of the information obtained. The tort is completed with the obtaining of the information by improperly intrusive means." *Pearson* v. *Dodd,* 410 F.2d 701, 704 (D.C. Cir. 1969) (publication of newsworthy information purloined by third party not intrusion privacy tort).

> Although it is clear that the interception of the Quigleys' telephone conversations would constitute an intentional intrusion on the Quigleys' seclusion or solitude, the issue raised by defendants is whether, as set forth in the district court's instructions, the "use" of intercepted telephone conversations can also constitute such an intrusion. We conclude the answer to this question is "no." In particular, once the interception of the conversations was complete, any subsequent "use" of the conversations could not have resulted in any additional intrusion on the Quigleys' seclusion or solitude.

Quigley v. *Rosenthal,* 327 F.3d 1044, 1073 (10th Cir. 2003).

Third, the photograph did not intrude into a private place. "The Defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place..." RESTATEMENT (SECOND) OF TORTS § 652B cmt. c. (1964). Oklahoma has adopted the Restatement of Torts (Second) definition of an intrusion on seclusion action.

Munley, 1978 OK 123, ¶ 13. *See, e.g., Swerdlick v. Koch,* 721 A.2d 849, 857-858 (R.I. 1998) ("no physical intrusion upon Plaintiff's seclusion when an individual takes a photographs of an object that any member of the public is free to observe.") summarizing holding in *Jaubert v. Crowley Post-Signal, Inc.,* 375 So. 2d 1386, 1390-91 (La. 1979). The photograph was taken at an event open to the public including news photographers. *See also, Eddy,* 1986 OK 3.

Proposition 5:
Because the Turnley photograph was not an advertisement, Davidson has no cause of action under 21 O.S. § 839.1

The Third Claim is asserted solely by Davidson as Personal Representative of Sgt. Brinlee's estate. Davidson alleges that Defendants violated 21 O.S. § 839.1 which provides:

> Any person, firm or corporation that uses for the purposes of advertising for the sale of any goods, wears or merchandise, or for the solicitation of patronage by any business enterprise, the name, portrait or picture of any person, without having obtained, prior or subsequent to such use, the consent of such person, or, if such person is a minor, the consent of a parent or guardian, and, if such person is deceased, without the consent of the surviving spouse, personal representatives, or that of a majority of the deceased's adult heirs is guilty of a misdemeanor. [emphasis supplied]

Plaintiffs allege Defendants published a picture of Sgt. Brinlee's open casket for the purpose of advertising solicitation of patronage for the sale of *Harper's* magazine.

Second Amend. Compl. ¶ 43. Davidson himself admits the photo-essay is not an advertisement. *Davidson Depo. p. 68, ll. 6--21.* App. at 5. "The Bereaved" was a news photo-essay published in the August 2004 edition of *Harper's* magazine and, as it is evident from an examination of "The Bereaved," was not published "for the purpose of advertising for the sale of any goods, wares or merchandise, or for the solicitation of patronage by any business enterprise" as required to state a claim under 21 O.S. § 839.1.

Oklahoma's criminal privacy law was patterned after similar New York statutes. The only reported Oklahoma appellate decision interpreting any portion of 21 O.S. § 839.1, *et seq.* is *LeFlore* v. *Reflections* of *Tulsa, Inc. LeFlore* considered only whether a claim for injunctive relief was required in order for a plaintiff to sue for damages under § 839.2. *LeFlore,* 1985 OK 72. But the Court in *LeFlore* cited and followed the New York Court's interpretation of that state's similar statute. New York Courts have consistently found "newsworthiness" and "public interest" exceptions to exist under the First Amendment.

> The advertising and trade limitation in New York's privacy statutes was crafted with the First Amendment in mind. Through Sections 50 and 51, the New York legislature sought to protect a person's right to be free from unwarranted intrusions into his or her privacy, while at the same time protecting the quintessential American right to freedom of expression. [citations omitted]

* * *

> In the end, free speech rights clearly transcend privacy rights when speech concerns "newsworthy

> evens or matters of public interest." *Stephano v. News Group Publications, Inc.*, 485 N.Y.S.2d 220,224-25 (1984)

Hoepker v. *Kruger*, 200 F.Supp. 2d 340, 348-349 (S.D.N.Y. 2002) .

> [W]e have made clear that these sections do not apply to reports of newsworthy events or matters of public interest. This is because a newsworthy article is not deemed produced for the purposes of advertising or trade. Additionally, these principles reflect "constitutional values in the area of free speech."

Messenger ex rel. Messenger v. Gruner + Jahr Printing and Publ'g., 94 N.Y.2d 436, 441, (2001) (citations omitted). Under Oklahoma law the provisions of 21 O.S. § 839.1, *et seq.* only apply to the use of a name or picture without consent for advertising purposes. The photograph of Sgt. Brinlee in a news photo-essay in a national news magazine falls squarely within the statutory and First Amendment newsworthiness exceptions and cannot, as a matter of law, violate Section 839.1.

Proposition 6:
A fraud claim for purely emotional damages must meet outrage requirements.

In their fourth claim, Plaintiffs allege fraud. *Second Amend. Compl.* at ¶ 51-59. In support of this claim they allege that: "Defendant induced permission to attend the funeral by falsely representing and promising that he would adhere to Plaintiffs' instructions." *Id.* at ¶ 53. Plaintiffs allege Turnley promised that "he would not photograph Kyle's open casket." *Id.* at ¶ 52. In essence, what the Plaintiffs have

alleged is fraudulent inducement, that is, Stephens (not the Plaintiffs) was induced to allow Turnley to attend the funeral service based on Turnley's alleged false promise that he would not photograph the open casket. Assuming, *arguendo,* that such a promise was made and broken, Stephens could have ejected Turnley from the funeral for breaking his alleged promise. The publication of the photograph which is the sole basis for the Plaintiffs claim to damages is not part of a claim for fraudulent inducement.

Plaintiffs cannot avoid by artful pleading, the First Amendment protections for the taking of a photograph of a public event. *Cf. Jewell v. Allen,* 1940 OK 464, ¶ 6; 109 P.2d 235 ("One exercising his legal right is not chargeable with fraud."). Further, although Oklahoma case law has allowed the recovery of emotional damages[10] for fraud, this case law has been subsumed into the tort of outrage. *See, e.g., Miller v. Miller,* 1998 OK 24, 956 P.2d 887, 956 n.42 (1998). Thus, the Plaintiffs cannot avoid the evidentiary requirements of the outrage tort by simply pleading fraud. Plaintiffs cannot prove any of the elements of the tort of outrage. Thus, they are precluded, as a matter of law, from prevailing in a fraud action based on the same facts., *i.e.* they cannot prove Defendants' intentional publication of an outrageous photograph nor that they were severely distressed as alleged.

As previously stated, the funeral was open to the public and the press. In *Sturgeon* v. *Retherford Publ'ns,* 1999 OK CIV APP 78, 987 P.2d 1218, the Oklahoma Court of Civil Appeals stated:

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[10] Emotional distress, to be compensable for willful fraud, must be medically diagnosable and significant. *Fetick* v. *American Cyanimid Co.,* 38 S.W. 3d 415, 419 (Mo. 2001).

> "To recover under the theory of fraudulent misrepresentation, or deceit, a plaintiff must prove (1) the defendant made a material misrepresentation; (2) that it was false; (3) the defendant made the representation knowing it was false or in reckless disregard of the truth (4) that the defendant made it with the intention that it should be acted upon bv the plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff thereby suffered injury. Ramsey v. Fowler, 1957 OK 61, 308 P.2d 654. All these allegations must be proven with a reasonable degree of certainty, and all of them must be found to exist. *Id.*"
>
> Obviously, an essential element of this tort is proof of detrimental reliance on the misrepresentation by the person claiming injury. Just as obviously, Plaintiffs in the case at bar do not, and cannot, allege their own reliance on any misrepresentation by Defendants. Thus, they cannot properly seek recovery under this legal theory. [emphasis original]

Sturgeon, at ¶ 34.

Turnley did not make a false representation to Showler or Davidson, much less make one with the intention that it should be acted upon. Showler did not act in reliance upon the nonexistent misrepresentation, or thereby suffer injury. It is clear from Plaintiffs' averments and from deposition testimony that Turnley did not meet or speak with Showler until after Sgt. Brinlee's funeral and burial. He never met or spoke to Davidson at all. He never made any representations, or promises to the Plaintiffs before taking the photographs complained of.

Proposition 7:
Defendants had no fiduciary duty to Plaintiffs and could not have committed Constructive Fraud

In their fifth claim, the Plaintiffs seek to allege constructive fraud based on the same allegations made in their fraud claim. In addition, Plaintiffs allege that they "have been directly harmed by the fraudulent and deceitful actions of the Defendants" and that the "fraudulent actions of Defendants resulted in an economic gain for the Defendants to the detriment of Plaintiffs as to constitute constructive fraud." *Second Amend. Compl.* ¶¶ 72-73.

Under Oklahoma law, a constructive fraud claim requires a plaintiff to show that defendant owed some form of duty to plaintiff such as a fiduciary duty or a duty based upon confidential relationship or special relationship of trust. *Robert's Ranch Co.* v. *Exxon Corp.*, 43 F.Supp. 2d 1252, 1259 (W.D. Okla. 1997). As with the fraud claim, it is uncontroverted that the only representation that Turnley made to Showler (he made none to Davidson) was that Turnley would send Showler the photographs that Turnley took of the funeral if Showler wanted them. Showler said not once, but on several occasions, he wanted them. Turnley's alleged representation to Stephens cannot possibly support a claim for constructive fraud based on the publication of the Turnley photograph. One allegedly damaged by deceit is not allowed to recover if the alleged misrepresentation was made to a third party. *Cooper* v. *Parker-Hughley,* 1995 OK 35, 894 P.2d 1096. Turnley had no fiduciary relationship with Showler or Davidson nor any other duty imposed by law.

As stated in *Varn* v. *Maloney,* 516 P.2d 1328, 1332 (Okla. 1973):

> The essential elements of fraud are well settled. The proof must show a material false representation, made with knowledge of its falsity or recklessly without knowledge as to its truth or falsity, as a positive assertion, with the intention that it be acted upon by another, who does act in reliance thereon, to his injury. [Citation omitted.].

The sole basis for the fraud claim is the allegation that funeral director Stephens told Turnley he could not take photographs of Sgt. Brinlee's open casket; that Turnley agreed, that Turnley gained access to the funeral based on his agreement, and that Turnley did take photographs of the open casket. *Second Amend. Compl.,* ¶ 63-75. Turnley denies any such agreement or discussion of the open casket. *Turnley Depo.* p. 8, l. 5 — p. 9, l. 9; p. 46, l. 7 — p. 49, l.8; p. 91, l. 8 — p. 93. l. 23. App. at 5. Even taken as true. which Defendants deny, these were alleged statements to Stephens. Showler never met or spoke with Turnley prior to the funeral, never made any requirements of Turnley and never relied to his detriment on the alleged fraudulent representations of Turnley. In fact, Plaintiffs repeatedly allege and have testified that they "were unaware Defendant Turnley photographed the funeral service." *Second Amend.Compl.* ¶¶ 16,38 & 46.

Proposition 8:
Defendants were not Unjustly Enriched

Plaintiffs' Fifth claim is for unjust enrichment. Plaintiffs allege that "Defendants have realized financial gains, profits, business, sales and recognition through fraud, deceit and

misrepresentations perpetrated upon Plaintiffs." *Second Amend. Compl.* ¶ 77. In Oklahoma "unjust enrichment" results from the "failure of a party to make restitution in circumstances where it is inequitable." *Lupkin v. Pino,* 2001 OK CIV APP. 29, ¶ 7, 23 P.3d 958,961. To state a claim for unjust enrichment, there must be allegations supporting "enrichment to another coupled with a resulting injustice." *N.C. Corff Partnership, Ltd. v. OXY USA, Inc.,* 1996 OK CIV APP 92, ¶ 25, 929 P.2d 288, 295 (quoting *Teel v. Public Service Co. of Okla.,* 1985 OK 112, ¶ 23, 767 P.2d 391, 398. There is no allegation in this case that any benefit came to either of the Defendants at the expense of the Plaintiffs. As a member of the press Turnley was entitled, in accordance with the freedoms granted under the First Amendment to the Constitution, to photograph a public and newsworthy event and Harper's was entitled to publish the photo essay including the photograph of Sgt. Brinlee.

Proposition 9:
Harpers has no liability for negligent hiring.

In their Seventh Claim captioned "Negligent Hiring, Retention and Supervision", Plaintiffs allege that Harpers "had or should have had prior knowledge and/or was on notice of Defendant Turnley's propensity to obtain and publish controversial and objectionable photographs." *Second Amend. Compl.* ¶¶ 81-90.[11]

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[11] Being controversial or objectionable are not the applicable standards for imposing liability under this tort. Both federal and state courts which have denied actions based on even unauthorized photographs of deceased persons. *See, Riley* v. *St. Louis County of Missouri,* 153 F.3d 627 (8th Cir. 1998); *Cox Texas Newspapers, L.P. v. Wootten,* 59 S.W.3d 717, (Tex. Ct. App. 2001); *Fitch v. Voit,* 1993 WL 141588 (Ala. Cir. Ct. 1993).

Under the Undisputed Facts, Turnley was an independent contractor not Harpers' employee. The tort of negligent hiring, retention and supervision applies to employer-employee situations where one is seeking damages for an intentional tort of an employee acting outside of his employment. Hence the tort has no application here.

> In Oklahoma it is well settled that to impose liability on an employer for its employee's intentional tort that (1) the relationship of master and servant must exist and (2) the tortious act must have been committed while the employee was acting within the scope of employment. *Rodebush v. Oklahoma Nursing Homes, Inc.*, 867 P.2d 1241, 1244 (Okla. 1993); *Brown v. Ford,* 905 P.2d 223, 230 (1995).

Jordan v. Cates, 1997 OK 9, ¶ 9.

In general, those who engage independent contractors have no liability for the acts of the independent contractor unless the work is inherently dangerous or unlawful or the principal contractor owes a contractual or defined legal duty to the injured party. *Hudgens v. Cook Indus., Inc.*, 1973 OK 145, ¶ 11, 521 P.2d 813; *Young v. Bob Howard Auto., Inc.*, 2002 OK CIV APP 80, ¶ 16, 52 P.3d 1045; *Town of Freedom, Okl. v. Muskogee Bridge Co., Inc.*, 466 F.Supp. 75, 79 (W.D. Okla. 1978). The Plaintiffs have not alleged and cannot prove that Turnley was engaged in any inherently dangerous or unlawful activity.

In any event, because Turnley (for the reasons previously articulated herein) has committed no tort, Harpers' can have no independent liability to Plaintiffs. *Baden v. First Presbyterian Church of Sallisaw,* 1993 OK 105, 857 P.2d

789, 797 (because the underlying actions were not cognizable, there can be no cause for negligent hiring or supervision).

Turnley's reputation as an well-respected international freelance photographer is uncontroverted. Plaintiffs have produced no evidence that could remotely meet the standard for this tort if it applied which it does not.

CONCLUSION

The Court should grant Defendants Harper's Magazine Foundation and Peter Turnley summary judgment on all of Plaintiffs' claims as a matter of law.

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APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 05-CV-178-S

[Filed November 18, 2005]

ROBERT SHOWLER, JOHNNY DAVIDSON, Individually and as Special Administrator of the Estate of Kyle Adam Brinlee, Plaintiffs	)
v.	)
HARPER'S MAGAZINE FOUNDATION, PETER TURNLEY, Individually and in his capacity as a Contributing Editor to HARPER'S MAGAZINE, Defendants.	)

PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant's Motion for Summary Judgment should be denied because the single most important fact in this lawsuit is disputed. Plaintiffs have credible evidence that the Defendant Turnley was told not to take photographs of Kyle Adam Showler (Brinlee) lying in the casket, and that Defendant Turnley agreed to this restriction. Defendant Turnley denies this fact. While Defendants cast many stones in their Motion for Summary Judgment, they omit any reference to this material and disputed fact. However, it cannot be ignored. If for no other reason, Defendants' Motion should be denied because there is a material fact in dispute.

STATEMENT OF MATERIAL FACTS IN DISPUTE

1. Kyle's family, through the funeral director Rick Stephens, told Turnley on two occasions not to approach Kyle's family for an interview, and not to take pictures of Kyle in his open casket. (Exhibit D, Stephens' Deposition at p. 78, lines 19-25; p. 79, lines 1-4; p. 83 lines 1-3).

2. Turnley acknowledged and agreed to Plaintiffs' restrictions set forth in the preceding paragraph. (Exhibit D, Stephens' Deposition at p. 87, lines 12-15).

3. Turnley denies that he was told not to photograph the open casket. (Exhibit E, Turnley's Deposition at p. 7, lines 9-13; p. 36, lines 24-25; p. 38, lines 18-20; p. 92, lines 1-14).

4. Turnley testified in deposition that Stephens "is either mistaken or not telling the truth." (Exhibit E, Turnley's Deposition at p. 9, line 9).

5. Turnley did not tell Robert Showler that he took multiple photographs of Kyle's open casket. (Exhibit A, Showler's Deposition at p. 39, lines 4-6).

6. Defendants did not have permission to publish open casket photographs of Kyle in the August 2004 issue of Harper's *Magazine*. (Exhibit C, Plaintiffs' Second Amended Complaint ¶ 34, Exhibit D, Stephens' Deposition at p. 78, lines 19-25; p. 79, lines 1-4; p. 83 lines 1-3).

7. Turnley did not tell Showler that he intended to mail Showler numerous photographs of Kyle's open casket. (Exhibit A, Showler's Deposition at p. 39, lines 4-6).

8. Showler first learned that Turnley had taken multiple open casket photographs when copies of the photographs arrived in the mail at his residence. (Exhibit A, Showler's Deposition at p. 63, lines 19-25; p. 64, lines 1-4; p. 65, lines 3-5).

9. Kyle's casket was opened only for family and close friends to view prior to the service. (Exhibit A, Showler's Deposition at p. 33, lines 18-20; p. 34, lines 12-16).

10. Stephens was prepared to exclude members of the press from the service who would not agree to the family's instructions. (Exhibit D, Stephens' Deposition at p. 87, lines 1-20).

11. Defendant Turnley held himself out to the public as an employee/agent of *Harper's Magazine* when he introduced himself to Stephens and Showler as "Peter Turnley with Harper's Magazine" and/or "a reporter for Harper's" and/or "Peter Turnley, a photojournalist for Harper's Magazine" and/or "Peter Turnley a photographer for Harper's Magazine" (Exhibit D, Stephens' Deposition at p. 78, lines 15-17; p. 80, lines 1-3; Exhibit A, Showler's Deposition at p. 38, line 25; and Exhibit E, Turnley's Deposition at p. 17, lines 20-22; p. 68, lines 12-15; p. 75, lines 19-20; p. 81, lines 16-17; p. 91, lines 12-14; and Exhibit J, Defendant Turnley's Business Card.)

12. The photographs Turnley took of Kyle in the open casket including the one which appeared in the *Harper's* August 2004 issue invaded Plaintiffs privacy and caused each of them extreme emotional distress and shock. (Exhibit A, Showler's Deposition at p. 57, lines 4-9).

13. Defendants promoted the photograph of Kyle's open casket prior to its publication in *Harper's*. (Exhibit H, E-

mails between Turnley and individuals with *Harper's Magazine).*

14. Despite having notice that Kyle's family objected to the taking of the open casket photographs and the subsequent publication of said photograph, Defendants continued to promote the photo-essay containing the open casket photograph including entering the photograph in numerous competitions. (Exhibit H, E-mails produced by Defendants between Peter Turnley and individuals with *Harper's Magazine*).

15. Robert Showler chose to seek legal advice approximately one week after viewing the photographs at issue. (Exhibit A, Showler's Deposition at p. 58, line 6).

STATEMENT OF ADDITIONAL UNCONTROVERTED MATERIAL FACTS

1. Kyle Adam Showler (Brinlee) is the natural son of Robert Showler. (Exhibit C, Plaintiffs' Second Amended Complaint ¶ 6).

2. Johnny Davidson is Kyle's grandfather and the Personal Representative of Kyle's Estate. (Exhibit C, Plaintiffs' Second Amended Complaint ¶ 7).

3. Kyle joined the National Guard in April, 2001. (Exhibit C, Plaintiffs' Second Amended Complaint ¶ 8).

4. Kyle was killed in action in Iraq on May 11, 2004, when an IED detonated near his vehicle. (Exhibit C, Plaintiffs' Second Amended Complaint ¶ 8).

5. Robert Showler, Kyle's father and next of kin, was informed of Kyle's death at 6:15 a.m. on May 12, 2005. (Exhibit A, Showler's Deposition at p. 25, lines 9-16).

6. Johnny Davidson also learned of Kyle's death on May 12, 2005. (Exhibit B, Davidson's Deposition at p. 26, lines 20-24).

7. Showler and Davidson hired Stephens Memorial Chapel in Pryor, Oklahoma to handle the funeral arrangements. (Exhibit A, Showler's Deposition at p. 30, lines 3-12).

8. On May 13, 2004, Showler, Davidson and other members of Kyle's family met with Rick Stephens of Stephens Memorial Chapel to discuss the funeral arrangements. (Exhibit A, Showler's Deposition at p. 30, lines 13-25; p. 31, lines 1-6; p.33, lines 18-20; p. 35, lines 1-23; and Exhibit D, Stephens' Deposition at p. 33, lines 1-6).

9. Showler and Davidson instructed Rick Stephen that they did not want anyone taking pictures of Kyle's open casket. (Exhibit A, Showler's Deposition at p. 43, lines 16-21; and Exhibit D, Stephens' Deposition at p. 32, lines 21-22).

10. Rick Stephens spoke with Peter Turnley by telephone before the funeral. (Exhibit D, Stephens' Deposition at p. 78, lines 4-8; Exhibit E, Turnley's Deposition at p. 92, lines 1-14).

11. During his telephone conversation with Rick Stephens, Defendant Turnley requested permission to attend the funeral. (Exhibit E, Turnley's Deposition at p. 91, lines 10-11).

12. Turnley has admitted that Stephens told him the family did not want to be approached or contacted during the funeral

service. (Exhibit E, Turnley's Deposition at p. 92, lines 11-14).

13. Defendant Turnley has admitted that Stephens instructed him to take pictures only from the area reserved for the press. (Exhibit E, Turnley's Deposition at p. 93 lines 20- 22).

14. Kyle's funeral was held on May 19, 2004, at the Pryor High School Auditorium, Pryor, Oklahoma. (Exhibit C, Plaintiffs' Second Amended Complaint, ¶ 9).

15. Stephens spoke again with Turnley on the day of the funeral. (Exhibit D, Stephens' Deposition at p. 79, lines 9-10).

16. A press area was reserved at the back of the Pryor High School Auditorium. (Exhibit D, Stephens' Deposition at p. 54, lines 4-9).

17. Defendant Turnley took multiple photographs of Kyle in his open casket. (Exhibit E, Turnley's Deposition at p. 21, lines 6-24).

18. Defendant Turnley also left the area reserved for the press and took photographs of Kyle in his open casket from the control booth. (Exhibit F, Avra Deposition at p. 6, lines 5-25; p. 7, lines 1-25; p. 8, lines 1-25; p. 9, lines 1-25; and p. 10, lines 1-15).

19. Contrary to the family's instructions to which Turnley had agreed, Turnley approached Robert Showler at Kyle's grave site. (Exhibit A, Showler's Deposition at p. 38, lines 3- 5; and Exhibit E, Turnley's Deposition at p. 17, lines 15-22).

20. Turnley offered to send Showler photographs, but Turnley did not disclose that he had taken multiple photographs of Kyle's open casket. (Exhibit A, Showler's Deposition at p. 39, lines 4-9; Exhibit E, Turnley's Deposition at p. 18, lines 1-3; and Exhibit I, Copies of photographs sent to Robert Showler).

21. The caption describing the photograph of Kyle's open casket published in the August 2004 edition of *Harper's Magazine* only identifies "the casket of SPC. Brinlee at funeral services in a high school auditorium in Pryor, Oklahoma." Other persons appearing in the photograph, including Governor Brad Henry, are not identified in the caption. (Exhibit G, Photograph of Kyle Adam Showler (Brinlee) from "The Bereaved").

22. Kyle's headstone reads: Kyle Adam Showler (Brinlee).

23. On August 7, 2004, Courtney Neal, Kyle's aunt, emailed Defendant Turnley wherein she expressed her objections to the photograph of Kyle's open casket (Exhibit E, Turnley's Deposition at p. 168, lines 14-25; p.169; and Exhibit K, E-mails produced by Defendants between Peter Turnley and individuals with *Harper's Magazine*).

ARGUMENTS AND AUTHORITIES

A. THE STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure requires that a moving party show that it is entitled to summary judgment, and the court is required to review the record in the light most favorable to the non-moving party. *Bell v. Dillard Dep't Stores, Inc.*, 85 F.3d 1451, 1453-54 (10th Cir. 1996).

The United States Supreme Court, citing Rule 56(c), has determined that:

> summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The Court in *Anderson* stated that:

> Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Id. at 250, 2511.

The Supreme Court went on to hold that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of

> the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. (Citation omitted.) Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Id. at 255, 2513.

Clearly, the Material Facts in Dispute require the making of credibility determinations and weighing of evidence in order to resolve the case at hand prior to trial. The relevant testimony of Rick Stephens directly contradicts and controverts the Defendants' primary stance in this case, which is that Defendant Turnley had permission and the right to take the photograph at issue.

B. Summary Judgment is Improper in This Case as Material Facts Are in Dispute

Defendants entire basis for summary adjudication in this case rests upon whether Defendant Turnley's actions in photographing the open casket of Kyle Adam Showler (Brinlee), regardless of any agreement to the contrary, would be excused pursuant to the First Amendment. Defendants attempt to skirt the most important factual question, which is whether Defendant Turnley, as an employee, agent or apparent agent of *Harper's Magazine*, was told and agreed not to take such photographs. The existence of such agreement between Rick Stephens, on behalf of Kyle's family, and Defendant Turnley is the material fact that is hotly in dispute and which is central to every cause of action raised by Plaintiffs.

1. The First Amendment Does Not Protect Defendants Improper Taking and Publishing of the Photograph of the Open Casket of Kyle Adam Showler (Brinlee)

Plaintiffs contend that Defendant Turnley tortiously obtained the photograph of Kyle Adam Showler (Brinlee) in his open casket, and in turn, Defendants jointly tortiously published and promoted the same. The Oklahoma Court of Criminal Appeals, following the United States Supreme Court, as well as Federal District Courts, and Federal Courts of Appeal, has held that:

> **The First Amendment has never been construed to accord newspersons from immunity from torts or crimes committed during the course of newsgathering.** The First Amendment is not a license to trespass....Crimes and torts committed in news gathering are not protected. (Citations omitted.) There is **no threat** to a free press in requiring its agents to act within the law. (Emphasis added).

Stahl v. State, 1983 OK CR 90, 665 P.2d 839, 841-842. The United States Supreme Court has specifically held that:

> It is clear that the First Amendment does not invalidate every **incidental burdening of the press** that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. **The Court has emphasized that the publisher of a newspaper has no special immunity from the application of general laws. He has no**

> **special privilege to invade the rights and liberties of others.** (Emphasis added).

Branzburg v. Hayes, 408 U.S. 665, 682-83, 92 S.Ct. 2646, 2657 (1972).

The Court in *Branzburg* went on to state that: **"The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish."** (Emphasis added). *Id* at 684, 2658.[1] The United States Supreme Court followed its prior ruling in *Cohen v. Cowles Media Co.,* 501 U.S. 663, 111 S.Ct. 2513 (1991) and went on to hold:

> ...generally applicable laws **do not offend the First Amendment** simply because their enforcement against the press has incidental effects on its ability to gather and report the news. As the cases relied upon by respondents recognize, the truthful information sought to be published **must have been lawfully acquired.** (Emphasis added.)

Id. at 669, 2518.

Before this Court can entertain whether Defendants are entitled to claim First Amendment protection, this Court must

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[1] *See also Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *Gallella v. Onassis*, 487 F.2d 986 (2nd Cir. 1973); *Miller v. Nat'l Broadcasting Co.*, 187 Cal.App.3d 1463 (Cal. Ct. App. 1986); *Shulman v. Group W Prod., Inc.*, 18 Cal.4th 200, 74 Cal.Rprt.2d 843, 955 P.2d 469 (Cal. 1998); *LeMistral, Inc. v. Columbia Broadcasting Sys., Inc.*, 61 A.D.2d 491,402 N.Y.S.2d 815 (N.Y. Sup. Ct. 1978); *Anderson v. WROC-TV,* 109 Misc.2d 904,441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981).

first determine whether Defendants improperly took and published the photograph of Kyle Adam Showler (Brinlee) in his open casket. In order to make such determination, it must be decided whether Defendant Turnley did in fact agree not to take such photographs when he requested permission to attend Kyle's funeral. The testimony of Rick Stephens is absolutely contrary to the testimony of Defendant Turnley on this issue.

Rick Stephens testified that one of the restrictions he placed upon the media was that Kyle's family was not to be contacted or bothered, to which Defendant Turnley admittedly agreed. (Exhibit D, Deposition of Rick Stephens, p. 78, lines 19-25; p. 79, lines 1-4; and Exhibit E, Deposition of Peter Turnley, p. 92, lines 11-14). Defendant Turnley also admitted that he was instructed and agreed to take photographs only from the section of the auditorium reserved for the press. (Exhibit E, Deposition of Peter Turnley, p. 93 lines 20-22). Rick Stephens testified that in addition to the restrictions he communicated to Defendant Turnley, he did in fact exclude others from attending the funeral of Kyle Adam Showler (Brinlee); he refused to give Ronald Brinlee, Kyle's step-father, permission to attend the funeral. Rick Stephens also testified that he was ready to exclude any member of the press that refused to abide by the family's instructions or restrictions. (Exhibit D, Deposition of Rick Stephens, p. 87, lines 1--20).

Defendant Turnley testified that he approached Kyle's family at the conclusion of the interment service, which is an admission that he directly violated at least one of the restrictions placed upon the press to which he had previously agreed. It is also undisputed that Defendant Turnley took the photographs of Kyle's open casket from an area outside of the area reserved for the press, in direct violation of another

restriction placed upon the press to which he had previously agreed. (Exhibit F, Deposition of Herschel Avra, p. 6, lines 5-25; p. 7, lines 1-25; p. 8, lines 1-25; p. 9, lines 1-25; and p. 10, lines 1-15). As such, it is undisputed that Defendant Turnley intentionally breached two (2) of the agreements he admittedly made with Rick Stephens, thereby failing to abide by specific instructions of the family and violating their privacy.

Defendant Turnley's admitted misconduct clearly suggests that Defendant Turnley also tortiously obtained the photograph of Kyle's open casket by wholly disregarding, either intentionally or recklessly, the express instructions of the family, which Turnley specifically denies. The jury must be allowed to determine in this case whether to believe Rick Stephens or Defendant Turnley, and to determine whether Defendant Turnley's actions at the funeral of Kyle Adam Showler (Brinlee) constitute fraud, misrepresentation, constructive fraud, deceit, invasion of privacy, and/or misappropriation.

2. Robert Showler and Johnny Davidson had the right to place restrictions upon the press in attendance at Kyle's funeral to protect the family's right to privacy.

As this Court is aware, the United States Supreme Court has recognized Congress' rationale in protecting the privacy of family members when it enacted Exemption (C) to the FOIA. *National Archives and Records Administration v. Favish,* 541 U.S. 157, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004). The Court specifically stated that:

> We have little difficulty, however, **in finding in our case law and traditions the right of family members**

> **to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes**.... Family members have a personal stake in honoring and mourning their dead and **objecting to unwarranted public exploitation** that, by intruding upon their own grief, tends to degrade the rights and respect they seek to accord to the deceased person who was once their own. **In addition this well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law.** Indeed, **this right to privacy has much deeper roots in the common law** than the rap sheets held to be protected from disclosure in *Reporters Committee*.... We can assume Congress legislated against this background of law, scholarship, and history, when it enacted FOIA and when it amended Exemption 7(C) to extend its terms. (Emphasis added).

Id. at 167-169, 1578-1579.

The Supreme Court, in discussing the common law rights of families to protect the death images of their deceased, was not discussing the application of the statutory right to privacy created under the FOIA, but rather the common law backdrop for Congress' decision to enact that statutory right to privacy. It is that common law right to privacy, recognized by the U.S.
Supreme Court, that Defendants have clearly violated in this case.

As fully discussed in both of Plaintiffs' Responses and Objections to Defendants' Motions to Dismiss, Oklahoma has

recognized the "right of family members to direct and control disposition of the body of the deceased" discussed by the U.S. Supreme Court in *Favish* in Oklahoma Statute title 21, § 1158 (1997) and *Brady v. Criswell Funeral Home, Inc.*, 1996 OK CIV APP 1, 916 P.2d 269. In *Brady*, the Court of Appeals reviewed whether a funeral home could be negligent in proceeding with the cremation of a deceased person over the objection of a family member. The funeral home's knowledge of a disagreement between the children of the deceased precluded awarding the funeral home summary judgment, because:

> Such knowledge of disagreement between next of kin with equal authority to dispose of the bodily remains overrides Appellant's brother's representation that he had the authority to determine the disposition of the body. Sufficient facts exist **creating at least a question of fact** as to whether Appellee funeral home **did what it reasonably should have done.** (Emphasis added).

Id. at 271.

Clearly, pursuant to *National Archives and Records Administration v. Favish, supra.*, Oklahoma Statute title 21, § 1158 (1997) and *Brady v. Criswell Funeral Home, Inc., supra.*, Robert Showler and Johnny Davidson had the right to control every aspect of Kyle's funeral, and in particular to restrict the taking of photographs of Kyle's open casket. It is **undisputed** that Plaintiffs' gave such instructions to Rick Stephens. (Exhibit A, Deposition of Robert Showler, p. 43, lines 16-21; Exhibit D, Deposition of Rick Stephens, p. 32, lines 21-22). A jury must be allowed to decide whether Defendant Turnley violated his agreement to refrain from taking pictures of Kyle's open casket, as such breach of

agreement would result in a violation of Plaintiffs' privacy in controlling the funeral of their fallen loved one.

3. Robert Showler's and Johnny Davidson's rights to privacy were violated by Defendants' actions which are not protected by the First Amendment.

Plaintiffs contend that Defendants violated the privacy of Robert Showler and Johnny Davidson in the taking and publishing of the photograph of Kyle Adam Showler (Brinlee) in his open casket after being expressly told not to do so. Of course, Defendants deny this making it a question of fact for a jury.

Oklahoma has long recognized a statutory right to privacy at 21 O.S. §§ 839.1 and 839.2 (1965) that even extends beyond death to a defined group persons. The Oklahoma Supreme Court case of *McCormack* v. *Oklahoma Pub. Co.*, 1980 OK 98, 613 P.2d 737, supports Robert Showler's and Johnny Davidson's common law causes of action for invasion of privacy and misappropriation. As this Court is aware, 21 O.S. § 839.1 (1965) states:

> Any person, firm **or corporation** that uses for the purpose of **advertising** for the **sale of any goods, wares or merchandise,** or for the **solicitation of patronage** by any business enterprise, the name, portrait or picture of any person, without having obtained, prior or subsequent to such use, the consent of such person, or, if such person is a minor, the consent of a parent or guardian, and, if such person is deceased, without the consent of the surviving spouse, personal representatives, or that of a majority of the deceased's adult heirs, is guilty of a misdemeanor. (Emphasis added).

Oklahoma law does not give any special definitions to the words advertise, goods, wares, merchandise or patronage, which implies these words are to be given their ordinary, everyday meanings.

Merriam-Webster's Dictionary defines "advertise" as "to make publicly and generally own; to announce publicly especially by a printed notice or broadcast; or to call public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize: PROMOTE." MERRIAM-WEBSTER ONLINE DICTIONARY (2005; MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 10th ed. 2002). Merriam-Webster's Dictionary defines "promote" as "to present (merchandise) for buyer acceptance through advertising, publicity or discounting." *Id.* Merriam-Webster's Dictionary defines a "good" as "something that has economic utility or satisfies an economic want" or "something manufactured or produced for sale." *Id.*

In the numerous emails attached hereto as Exhibit H, Defendants continuously refer to the "promotion" of *"The Bereaved"* both nationally and internationally, through print and broadcast media, as well as entering the photographs in multiple competitions. Clearly, Defendants intended to promote, through publicity, the sale of *Harper's Magazine,* as well as promote themselves, when Defendant Turnley appeared on multiple television programs to discuss *"The Bereaved."* Defendants promoted *"The Bereaved"* in order to increase circulation of the magazine and to bolster Turnley's reputation as a photographer. By making *"The Bereaved"* known to the public for these reasons, Defendants were advertising *"The Bereaved"*.

Defendants' mendacious attempt to argue that somehow *Harper's Magazine* is not a good or merchandise that is sold,

or that *Harper's Magazine* does not solicit the patronage of its readers, is in direct contravention to the clear and plain definitions of the language set forth in 21 O.S. §839.1. As such, Defendants promotion of *"The Bereaved"* constitutes "advertising" or at a minimum "solicitation of patronage" as required by 21 O.S. § 839.1. Plaintiffs contend that they restricted Defendants from taking and using the photographs at issue, and that the Defendants did not obtain Plaintiffs permission to publish the same. Therefore, Defendants have clearly violated 21 O.S. § 839.1, and thereby violated Plaintiffs rights to privacy.

The 10th Circuit Court of Appeals has held that the privacy rights of individuals must be weighed against the right of the press to report information to the public, and the Court set forth guidelines to follow in determining whether the press has strayed outside the boundaries of First Amendment protection:

> ... the right of the individual to keep information private must be balanced against the right of the press to disseminate newsworthy information to the public. In attempting to strike an acceptable balance between these competing interests, liability may be imposed for publicizing matters concerning the private life of another "if the matter publicized is of a kind that (a) **would be highly offensive to a reasonable person,** and (b) is not of legitimate concern to the public." Restatement 2d of Torts § 652D (1977). As comment h points out, not all matters are of legitimate public interest: The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes **a morbid and sensational prying into private lives for its own sake with which a reasonable member of the public,**

> **with decent standards, would say that he had no concern.** Thus, dissemination of non-newsworthy private facts is not protected by the first amendment. (Emphasis added.)

Gilbert v. Medical Economics Co., 665 F.2d 305, 307 (10th Cir. 1981).

The California Supreme Court elaborated on the 10th Circuit's decision in *Gilbert* stating that:

> ... all of the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element. **Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material.** (Emphasis added).

Shulman v. Group W Productions, Inc., 955 P.2d at 493.

The Court went on to state that:

> ... no constitutional precedent or principle of which we are aware gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast.

Id at 497.

Rational people recognize that mourning over the death of a loved one is a deeply private matter. Plaintiffs cannot fathom how Defendants can attempt to claim that the picture

of Kyle Adam Showler (Brinlee) lying in his open casket is substantially related to a matter of "legitimate public interest," especially when other, unobjectionable photographs of the funeral would have served the same purpose. Plaintiffs also cannot comprehend Defendants' ludicrous suggestion that taking a picture of a person's deceased loved one in their casket at a funeral is not a deeply personal and private matter, regardless of the number of attendees at the funeral. *See National Archives and Records Administration v. Favish, supra.* Plaintiffs contend that while the mourning of Kyle's death and honoring of his life may have been a matter of public interest, that public interest did not extend to the publication of photographs of Kyle's open casket.

Defendants' suggestion that the photograph of Kyle's open casket is now a matter of "legitimate public interest" because you can see Oklahoma's Governor, Brad Henry, in the photograph is again misleading. It is undisputed that the caption describing the photograph of Kyle's open casket published in the August 2004 edition of Harper's Magazine only identifies "the casket of Spc. Brinlee at funeral services in a high school auditorium in Pryor, Oklahoma." Other persons appearing in the photograph, including Governor Brad Henry who appears in the distant right corner, are not identified in the caption. (Exhibit G, Photograph of Kyle Adam Showler (Brinlee) from *"The Bereaved").* In truth, the only "interest" Defendants desired from publishing the photograph of Kyle's open casket was to elicit strong emotional responses to *"The Bereaved,"* thereby increasing their sales and notoriety. Indeed, in an email from Stacy Clarkson at *Harper's Magazine* to Turnley concerning *"The Bereaved"* as it appeared in the French magazine, *Le Monde 2,* Clarkson said: "I think the Harper's essay is a more emotionally disturbing and urgent story, which is what you

and I were aiming for together in the end." (Exhibit L, Email dated July 22,2004).

Therefore, it is for a jury to decide whether Defendant Turnley intentionally and willfully violated the rights of privacy of Robert Showler and Johnny Davidson and their rights to control the funeral and death images of their loved one, which pursuant to 21 O.S. § 839.1 would allow for the assessment of punitive damages. Additionally, it is for a jury to decide whether to believe a non-interested third party, Rick Stephens or to believe Defendant Turnley, in deciding whether Defendant Turnley deliberately violated the Plaintiffs' rights to privacy. Furthermore, the jury should make the determination as to whether the photograph of Kyle's open casket was newsworthy and entitled to First Amendment protection.

4. Defendants' intentional invasion of Robert Showler's and Johnny Davidson's privacy caused Plaintiffs to suffer severe emotional distress.

Oklahoma Courts recognize the right of an individual to recover for intentional infliction of emotional distress.

> To recover damages for intentional infliction of emotional distress, a plaintiff must prove: (1) the defendant acted intentionally or **recklessly**; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused the plaintiff emotional distress; and (4) the resulting distress was severe.

Computer Publications, Inc. v. Welton, 2002 OK 50, 49 P.3d 732,735.

In reviewing claims for intentional infliction of emotional distress, the Oklahoma Supreme Court held that:

> The court, in the first instance, must determine whether the defendant's conduct may reasonably be regarded so extreme and outrageous as to permit recovery, or whether it is necessarily so. **Where, under the facts before the court, reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in any given case has been significantly extreme and outrageous to result in liability.** (Emphasis added).

Breeden v. League Services Corp., 1978 OK 27, 575 P.2d 1374, 1377. See also *Gaylord Entertainment Co. v. Thompson,* 1998 OK 30, 958 P.2d 128.

Oklahoma law further recognizes that injuries to the "nervous system" are considered physical injuries. The Oklahoma Civil Court of Appeals in *Bennett* v. *City Nat'l Bank and Trust Co.*, 1975 OK CIV APP 71, 549 P.2d 393 determined:

> The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other... The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct,

> as by a blow, or indirect, through some action upon the mind.

Id. at 396.

The Oklahoma Civil Court of Appeals considered the issue of physical versus mental damages in a case involving the alleged improper cremation of plaintiff's family member. In *Brady v. Criswell Funeral Home, Inc.*, 916 P.2d at 271, the Court stated:

> Appellant's affidavit describes her damages caused by the shock of learning that her mother's body was cremated. She states that she experienced "feelings of acute distress, panic, fear, shock, physical pain and nausea." Because there is at least minimal evidence of physical symptoms, the lack of recoverable damages cannot be the basis for summary judgment. Although a plaintiff may not recover for mental anguish alone in a negligence case, if there is some physical suffering connected therewith, the mental anguish may be recovered for.

Defendants again cite to *Cox Texas Newspapers, L.P. v. Wootten,* 59 S.W.2d 717 (Tex. App. 2001) to suggest their actions were not extreme or outrageous. As discussed in Plaintiffs' Responses to Defendants' Motions to Dismiss, *Wootten* is distinguishable. In *Wootten,* the plaintiff did not pursue his claim for intentional infliction of emotional distress, but rather sought to recover for negligent infliction of emotional distress. The *Wootten* Court stated that negligent infliction of emotional distress is not recognized as a cause of action in Texas. The plaintiff in *Wootten* failed to amend his cause of action to include a general negligence claim.

The *Wootten* Court noted the **absence** of **any evidence** that the photographer and/or newspaper had knowledge of the plaintiff's demands his wife's body not be viewed. If, as Rick Stephens testified, Defendant Turnley willingly and intentionally chose to disregard the privacy of Kyle's family when he photographed Kyle's remains, reasonable minds could differ as to whether such disregard for the family's privacy constitutes sufficiently outrageous conduct. Additionally, a jury should determine whether Defendants' conduct was sufficiently outrageous considering the following: On August 7, 2004, Defendant Turnley received an e-mail from Courtney Neal, Kyle Brinlee Showler's aunt, in which she expressed her objections to the photograph of Kyle's open casket. (Exhibit E, Deposition of Peter Turnley, p. 168, lines 14-25, p.169); and despite having notice that Kyle's family objected to the taking of the open casket photographs and the subsequent publication, Defendants continued to promote the photo-essay containing the open casket photograph. (Exhibit H, E-mails produced by Defendants between Peter Turnley and individuals with *Harper's Magazine).*

Furthermore, the *Wootten* Court stated that: "We do not consider whether the Constitution would protect a publication that was extreme and outrageous." *Id.* at 724, fn. 3. The *Wootten* Court noted that the photograph in question was taken of a woman whose face was covered, and with no identifying marks or names published with the photograph. In this case, the Defendants published a photograph of Kyle lying in an open casket, with his head, face, and upper portions of his torso visible, with a caption identifying the body as that of Kyle Showler Brinlee. The holding in *Wootten* was limited to the narrow, specific set of facts, and not one of the narrow, specific facts identified by the *Wootten* Court is present in this case. Therefore, *Wootten* is inapplicable.

Defendants' suggestion that Plaintiffs cannot prove severe emotional distress due to the fact that neither Plaintiff has received extensive therapy for the same is unfounded. The Oklahoma Civil Court of Appeals in *Bennett v. City Nat'l Bank & Trust, Co., supra.*, determined that physician testimony was not required to prove damages for emotional distress. The Court stated:

> ... it is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and has rendered one who was physically strong and vigorous, weak and timid. If, from their own experience, jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, then such is a matter of general knowledge.

Id., at 398-399.

A jury must be allowed to determine whether Defendants acted intentionally or recklessly in violating the Plaintiffs rights to privacy when they took, published, and promoted the photograph of Kyle's open casket. A jury must also be allowed to determine if Defendants' intentional and/or reckless misconduct, solely for financial and personal gain, constituted extreme and outrageous conduct. A jury must also be allowed to determine if the pain and anguish that has been suffered by each of the Defendants by being forced to constantly re-live and dwell upon the death of their loved one, along with the knowledge that Defendants have made money and advanced their individual reputations for violation of the family's right to privacy, amount to severe emotional distress.

5. Defendants are directly responsible for the damages they caused to Plaintiffs through their own misconduct.

Defendants' attempt to shift the blame for their own tortious misconduct is disingenuous at best. Defendants' suggestion that somehow Plaintiff Showler is responsible for the damages he suffered because he unknowingly chose to view a magazine article that was supposed to honor his only son, but instead contained a photograph of his son's open casket that was taken in direct violation of his explicit instructions, is nothing short of ridiculous. Such a proposition is analogous to the suggestion that an individual who gets into his car to drive to work one day and is struck and severely injured by a drunk driver is responsible for his own injuries by choosing to drive to work that day.

Defendants' Proposition 2 appears to be an attempt to claim a defense based upon assumption of the risk, which is not a valid defense to claims based upon invasion of privacy, misrepresentation, fraud, deceit, constructive fraud, intentional infliction of emotional distress, unjust enrichment, or negligent hiring and retention. The cases cited by Defendants in support of their Proposition 2 are inapplicable to the case at hand, as none of the cases remotely suggest that a party can forego liability for its own tortious conduct because the injured party somehow assumed some sort of risk. Instead, the cases all involve some sort of state or governmental action that is challenged by a State or company. In each case, the respective courts determined the challenging parties had no standing to pursue the action. In the majority of the cases cited by Defendants, the courts found that only potential economic damages were being sought.

Plaintiffs could not have caused their own injuries in viewing the photographs taken by Defendant Turnley for the following reasons. First, Defendant Turnley did not inform Robert Showler that he photographed Kyle's open casket. (Exhibit A, Deposition of Robert Showler, p. 39, lines 4-6). Second, Defendant Turnley offered to send Robert Showler photographs, but failed to disclose that he had taken multiple photographs of Kyle's open casket. (Exhibit A, Deposition of Robert Showler, p. 39, lines 4-9) (Exhibit E, Deposition of Peter Turnley, p. 18, lines 1-3). Finally, Defendant Turnley did not inform Robert Showler that he intended to mail Robert Showler multiple photographs Kyle's open casket. (Exhibit A, Deposition of Robert Showler, p. 39, lines 4-6). As such, Plaintiffs had no reason to know that the photographs of Kyle's open casket would be contained in *"The Bereaved"* or in the subsequent package of photographs provided by Defendant Turnley. To suggest otherwise is to mischaracterize the testimony that has been presented.

6. Defendants actions in improperly obtaining, publishing and promoting the photograph of Kyle's open casket constitute fraudulent/false misrepresentation, fraud, deceit or constructive fraud.

Oklahoma Courts have identified the requirements to establish a claim for fraudulent/false misrepresentation.

> To recover under the theory of fraudulent misrepresentation, or deceit, a plaintiff must prove (1) the defendant made a material misrepresentation; (2) that it was false; (3) the defendant made the representation knowing it was false or in reckless disregard of the truth; (4) that the defendant made it with the intention that it should be acted upon *by the*

> *plaintiff* (5) that *plaintiff* acted in reliance upon it; and (6) that plaintiff thereby suffered injury.

Sturgeon v. Retherford Publications, Inc., 1999 OK CIV APP 78, ¶ 34, 987 P.2d 1218, 1228 citing *Ramsey v. Fowler*, 1957 OK 61, 308 P.2d 654. In discussing the requirements for constructive fraud, fraud and deceit the Oklahoma Courts have held:

> It is equally well settled that the concealment of material facts which one is bound under the circumstances to disclose, may constitute fraud.

Varn v. Maloney, 1973 OK 133, 516 P.2d 1328, 1332.

> Constructive fraud is statutorily defined in Oklahoma as 'any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him by misleading another to his prejudice, or to the prejudice of anyone claiming under him.' 15 O.S. 1991 § 59.

N.C. Corff Partnership, Ltd. v. OXY USA, Inc., 1996 OK CIV APP 92, 929 P.2d 288, 296.

Oklahoma Courts have never held that fraudulent statements or material representations cannot be made to the agent of the plaintiff. It is undisputed that Robert Showler and Johnny Davidson hired Stephens Memorial Chapel in Pryor, Oklahoma to handle the funeral arrangements. It is also undisputed that Robert Showler and Johnny Davidson directed Rick Stephens that Kyle's family did not want anyone taking pictures of Kyle's open casket. (Exhibit A, Deposition of Robert Showler, p. 43, lines 16-21; Exhibit D, Deposition of Rick Stephens, p. 32, lines 21-22). It is also undisputed that

Rick Stephens was prepared to exclude members of the press who would not agree to the family's instructions. (Exhibit D, Deposition of Rick Stephens, p. 87, lines 1--20).

Rick Stephens testified that Defendant Turnley was informed that the family would allow media attendance at Kyle's funeral under two conditions, i.e., that the family was not approached to be interviewed and no pictures could be taken of Kyle in his open casket. (Exhibit D, Deposition of Rick Stephens, p. 78, lines 19-25; p. 79, lines 1-4). Rick Stephens testified that he informed Defendant Turnley a second time the day of the funeral that the family asked that they not be approached and "no pictures were to be taken of Kyle in his casket." (Exhibit D, Deposition of Rick Stephens, p. 83, lines 1-3). Rick Stephens testified that Defendant Turnley acknowledged the Plaintiffs' instructions. (Exhibit D, Deposition of Rick Stephens, p. 87, lines 12-15). If, as Rick Stephens testified, Defendant Turnley agreed to abide by the family's instructions, a jury could infer that Defendant Turnley intentionally misrepresented his intentions or made the agreement in reckless disregard for the truth in obtaining permission to attend Kyle's funeral.

A jury could also reasonably conclude that Defendant Turnley's misrepresentation to Kyle's family, by and through their agent Mr. Stephens, was relied upon by Rick Stephens and Plaintiffs and was the sole basis upon which Defendant Turnley was allowed to attend Kyle's burial services. As fully discussed above, Plaintiffs had the right to exclude anyone from Kyle's funeral, but chose to allow even the media to attend, so long as the media agreed to abide by the family's conditions. Robert Showler and Johnny Davidson were subsequently damaged by allowing Defendant Turnley to attend Kyle's funeral, based upon Defendant Turnley's actions in direct violation of his agreement. Whether Defendant

Turnley's conduct constitutes fraudulent/false misrepresentation, fraud, deceit or constructive fraud is a jury question.

7. Defendants have been unjustly enriched with financial and personal profits from their misconduct.

As a result of Defendants' fraudulent misrepresentation, constructive fraud, fraud, deceit, or negligent misrepresentation, Defendants have unjustly benefited at the expense of the Plaintiffs. Defendants have received pecuniary gains through the sale of Defendant Turnley's photographic essay in the August 2004 issue of *Harper's Magazine,* the publication of the photo-essay in *Le Monde 2,* and the entrance of such photographs in various literary and photographic contests, which all contain the unlawfully obtained photograph of Kyle's open casket. Oklahoma Courts recognize the right of a party to recover damages for unjust enrichment.

> The term "unjust enrichment" describes a condition resulting from the failure of a party to make restitution in circumstances where it is inequitable. It is a recognized ground for recovery in Oklahoma. A right of recovery under the doctrine of unjust enrichment is essentially equitable; its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another.

N C. Corff, supra., at 295.

Defendants never sought permission from Plaintiffs before taking, publishing or promoting the photograph of Kyle's

remains. On August 7,2004, Defendant Turnley received an e-mail from Courtney Neal, Kyle Brinlee Showler's aunt, in which she expressed her objections to the photograph of Kyle's open casket. (Exhibit E, Deposition of Peter Turnley, p. 168, lines 14-25, p.169). Despite having notice that Kyle's family objected to the taking of the open casket photographs and the subsequent publication, Defendants continued to promote the photo-essay containing the open casket photograph. (Exhibit K, E-mails produced by Defendants between Peter Turnley and individuals with *Harper's Magazine).* It is unconscionable to suggest that Defendants, under the guise of the First Amendment, should be allowed to continue to profit from the pain and anguish they caused the Plaintiffs. Equity and justice require that Defendants be prevented from realizing profits obtained improperly and at the expense of the Plaintiffs. A jury must be allowed to decide the remedies available to Plaintiffs for the Defendants' misconduct.

8. Defendant Harper's Magazine is liable to Plaintiffs for its negligent hiring and retention of Defendant Turnley.

Oklahoma Courts have long recognized a cause of action for negligent hiring, retention and supervision. *See Jordan v. Cates,* 1997 OK 9, 935 P.2d 289; and *Dayton Hudson Corp. v. American Mutual Liability Insurance Co.,* 1980 OK 193, 621 P.2d 1155. In determining whether an employer or principal can be liable for the negligent hiring, retention or supervision of an employee or agent, the Oklahoma Supreme Court has stated:

> When recovery against the employer for an act of his servant is rested on prior knowledge of the servant's propensity to commit the very harm for which

> damages are sought, the basis of liability invoked is not respondeat superior but rather the employer's own negligence in not discharging the unfit servant.

Dayton, supra., at 1161.

The Court in *Jordan, supra,* at 293, held: "the theory of negligent hiring and retention is available in a nonvicarious liability case or in a case where vicarious liability has not been established."

Plaintiffs contend that *Harper's Magazine* had or should have had prior knowledge and/or was on notice of Defendant Turnley's propensity to obtain and publish controversial and objectionable photographs without permission. *Harper's Magazine* initially breached its duty by failing to determine whether Plaintiffs consented to the publication of the photograph of Kyle's remains. On August 7, 2004, Defendant Turnley received an e-mail from Courtney Neal, Kyle Brinlee Showler's aunt, in which she expressed her objections to the photograph of Kyle's open casket. (Exhibit E, Deposition of Peter Turnley, p. 168, lines 14-25, p.169). Despite having notice that Kyle's family objected to the taking of the open casket photographs and the subsequent publication, Defendants continued to promote the photo-essay containing the open casket photograph. (Exhibit H, E-mails produced by Defendants between Peter Turnley and individuals with *Harper's Magazine).*

Harper's Magazine knew or should have known; at that point, that Defendant Turnley improperly obtained the photograph of Kyle's open casket, but ignored the objections of Kyle's family. *Harper's Magazine* had a duty to Plaintiffs to prevent the reasonably foreseeable harm caused by their employee, agent, or apparent agent, Defendant Turnley.

Harper's breached their duty by retaining, supervising and permitting Defendant Turnley to submit the photograph depicting Kyle's remains at a private funeral for national publication and by continuing to promote such photograph after receiving the objection from Kyle's family.

Harper's Magazine published the photograph of Kyle's open casket so it could reap recognition, sales, business and profits, and knew or should have known that such publication was against the instructions and directions of Kyle's family. Accordingly, *Harper's Magazine* knew or should have known that the publication of the unlawfully obtained photographs of Kyle's open casket could cause Plaintiffs severe emotional distress. Therefore, it is a question for the jury to decide the extent of *Harper's Magazine* knowledge of and consent to Defendant Turnley's improper actions, and whether such disregard of the explicit instructions of Plaintiffs rises to the level of negligent hiring and retention.

CONCLUSION

WHEREFORE, premises considered, Plaintiffs, Robert Showler and Johnny Davidson, respectfully request an Order of this Court overruling Harper's Magazine Foundation's and Peter Turnley's Motion for Summary Judgment in its entirety and any other relief this Court deems just and proper.

Respectfully submitted,
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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 05-CV-178-S

[Filed December 1, 2005]

ROBERT SHOWLER, JOHNNY DAVIDSON, Individually and as Special Administrator of the Estate of Kyle Adam Brinlee, Plaintiffs,	)
v.	)
HARPER'S MAGAZINE FOUNDATION, PETER TURNLEY Individually and in his capacity as a Contributing Editor to HARPER'S MAGAZINE, Defendants.	)

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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November 28,2005

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DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants Harper's Magazine Foundation ("Harper's") and Peter Turnley ("Turnley"), submit the following Reply to

the "Plaintiff's Response to Motion for Summary Judgment" filed herein November 18, 2005.

Although the Plaintiffs' brief is 25 pages long, they have only one argument; that a single factual dispute precludes summary judgment. This single disputed fact is whether Rick Stephens told Peter Turnley not to photograph Sgt. Brinlee's open casket. Defendants certainly concede that Stephens testimony is vigorously disputed.[1] Plaintiffs chide the Defendants because "they omit any reference to this material and disputed fact." *Id.* at 1. Defendants' "omission" was intentional. Disputed facts are not relevant to a motion for summary judgment. Although it may be "central to every cause of action raised by Plaintiffs,"[2] Stephens testimony is not material to Defendants' right to judgment as a matter of law. As described hereafter, none of the material facts relied upon by Defendants have been disputed.

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[1] Defendants also vigorously dispute Plaintiffs' characterization of Stephens as "a noninterested third party." *Pltf. Resp.* at 15. Stephens received the brunt of Robert Showler's initial reaction upon viewing the Harper's photo because of Showler's alleged instructions to Stephens. Stephens testified "I first got the impression that he was -- he was going to possibly even take his revenge out on me, he was that upset over the fact that -- he was a very upset man when I spoke to him on the phone." *Stephens Depo* p. 99 ll.7-10. Stephens had a very real economic interest in deflecting that anger away from Stephens' failure to follow Showler's instructions and advised Showler he thought he had a "legal case" and to seek an attorney." Showler Depo p. 57 l. 18-25.

[2] *Pltf. Resp.* at 7.

Plaintiffs argue that "the single most important fact in this lawsuit is disputed." *Id.* at 1 (underline in original). On the contrary, the single most important fact in this lawsuit is what Harpers/Turnley published. There is no dispute about the photo published by Harpers. Unless this photo is legally "outrageous," Plaintiffs have not been damaged in any legally-compensable manner. Without damages, the Plaintiffs have no cause of action under any theory regardless of what Stephens claims he told Turnley. As argued in Defendants' supporting brief, this photo -- as a matter of law -- is not outrageous. Further, Plaintiffs are estopped from claiming it is outrageous because they made a deliberate decision to make this image public on the basis that it was not outrageous. The Plaintiffs voluntarily viewed this same image on each of three days before the funeral and on the day of the funeral. The Plaintiffs deliberately had the casket taken to the back of the auditorium next to the area set aside for the press and the exit doors and then had the casket opened for viewing by any of the hundreds who attended the funeral. Plaintiffs can hardly now claim that this image they deliberately exposed is "outrageous."

Stephens' testimony is also not material because of the First Amendment protection for publishing photos of what occurs in the public square. Regardless of the theory asserted by Plaintiffs, this First Amendment protection cannot be evaded. Plaintiffs vainly seek to eviscerate this protection by wrongly characterizing the Turnley-Stephens dispute. Plaintiffs state that Harper's published "Unlawfully obtained photographs." *Pltf. Resp.* at 25. Turnley violated no law in allegedly failing to follow Stephens' instructions.[3]

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[3] Taking a photograph at a public high school auditorium violates no state or federal law. In addition, as a private funeral director,

I. Plaintiffs Fail to Dispute Any of Defendants' Undisputed Material Facts

Local Rule 56.1(B) requires that:

> ...a brief in opposition to a motion for summary judgment...shall begin with a concise statement of material facts to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed."

Plaintiffs' Response fails to dispute any of Defendants' 31 Undisputed Material Facts. Because of Plaintiffs' failure to specifically controvert any of Defendants' Undisputed Material Facts, as required by Local Rule 56.1(B), all of Defendants' 31 Undisputed Material Facts "shall be deemed admitted for the purpose of summary judgment...." *Id.*

II. Plaintiffs' Reliance on State and Federal Case Law is Misplaced

Plaintiffs reliance on both federal and state court rulings on the protection of the press by the First Amendment is misplaced. *Stahl v. State,* 1983 OK CR 90, 665 P.2d 839 does not detract from the protection of Defendants' actions in this case by the First Amendment. The *Stahl* Court dealt with

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Stephens hardly had authority to deny someone entrance to a public facility. Herchel Avra, who did have some authority over the Pryor High School auditorium, saw and allowed Turnley to take the very photographs of which Plaintiffs complain.

the narrow question of whether nine members of the news media could avoid prosecution for misdemeanor "Trespass After Being Forbidden" in their efforts to cover citizen protests against the proposed Black Fox nuclear power plant near Inola. In this case Defendants violated no law in taking and publishing a newsworthy photograph at a public funeral in a public venue.

Likewise, Plaintiffs' reliance on *Branzburg v. Hayes*, 408 U.S. 665 (1972) is misplaced. *Branzburg* dealt with the limited issue of whether requiring a journalist to testify before a federal grand jury violated the protections of the First Amendment. The *Branzburg* court stated:

> The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime.

Id. at 682.

The *Branzburg* court did nothing to restrict the right of the press to take and publish truthful and lawfully obtained photographs of newsworthy subjects in public places. Plaintiffs cite only in part the statement from the *Branzburg* court that "the prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish." *Pltf. Resp.* at p. 8. The *Branzburg* court went on to state however

> "[a]lthough it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages or even criminal

> prosecution. *See, New York Times Co. v. Sullivan,* 376 U.S. 254, 279-280 (1964); *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 147 (1967) (Opinion of Harlan J.); *Monitor Patriot Co. v. Roy,* 401 US. 265, 277 (1971).

Id. at 683.

Nothing about the photograph at issue in this case was a "reckless falsehood damaging to private reputation." Unlike the journalist in *Branzburg, supra,* there is no argument in this case that Defendants rights should be any more than any member of the public who attended the funeral of Sgt. Brinlee. It is undisputed that the funeral in this case was a public event attended by more than 1,200 people and the subject of the funeral was newsworthy. Defendants' photograph of which Plaintiffs complain was truthful, accurate, dignified and showed exactly the same scene as was visible to the more than 1,200 members of the public, including Plaintiffs and members of their family, who attended the funeral and viewed the open casket in person. *Branzburg* does not detract from Defendants' entitlement to judgment as a matter of law in this case.

Further, the instant case is factually distinguishable from *Cohen* v. *Cowles Media Co.*, 408 U.S. 665 (1991). There, the media entities were approached by a political operative (Cohen) in a gubernatorial race with an offer to supply the media with damaging information about an opposing party's candidate, but only if the media agreed to keep Cohen's identity as a source confidential. In that case the reporters Cohen approached admitted agreeing to keep his identity confidential and thereby obtained and published the damaging information. In the course of investigating the story, reporters

confirmed through other records and interviews that Cohen had been sent by his party to give the damaging public record information to the media. Editors at the Minneapolis Star & Tribune Co. added the Cohen identity to the story and Cohen sued for breach of contract seeking compensatory damages for loss of his political job. The U.S. Supreme Court ultimately found that an action for breach of the media's contract to keep a source confidential could be pursued without offending First Amendment principles, but did not overrule the court's previous decisions in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) or *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). Those cases and later decisions such as *Bartnicki v. Vopper*, 532 U.S. 514 (2001) provide the First Amendment protections which entitle Defendants in this case to summary judgment.

Next Plaintiffs claim *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004) was a court recognition of "Congress' rationale in protecting the privacy of family members when it enacted Exemption (C) to the FOIA." *Pltf. Resp.* at p. 10. The *Favish* decision applies only to the request of a private individual for production of already existing government photographs under the federal Freedom of Information Act (FOIA). This, Plaintiffs cannot dispute. *Favish* dealt with official photographs of Deputy White House Counsel Vince Foster's body photographed by the Capital Hill Police at the site of his suicide and the District of Columbia Medical Examiner's office, that had not theretofore been observed by the public. *Favish* did not deal with press photographs of a deceased person prepared for and made available by the family to the public for viewing. The Supreme Court's narrow ruling, which allowed the federal government to deny a FOIA request for these government-taken death scene and autopsy photographs, did not overrule,

modify or otherwise impact any of the prior decisions of the United States Supreme Court or lower courts cited and relied upon by Defendants in support of their right to Summary Judgment. In the instant case, the photograph in question was taken by a journalist in a public setting, was so clearly newsworthy that no contrary argument can reasonably be advanced, and was published in a news magazine. There can be no clearer entitlement to First Amendment protection from civil liability with the coverage and publication of the photographs than that which exists in this case.

Next, Plaintiffs attempt to distract the Court from the issues at hand by asserting that Oklahoma has recognized the "right of family members to direct and control disposition of the body of the deceased." *Brady* v. *Criswell Funeral Home, Inc.*, 1996 OK CIV APP 1, 916 P.2d 269. There is no dispute that Robert Showler and Johnny Davidson, along with other members of Sgt. Brinlee's family, had the right to control every aspect of Sgt. Brinlee's funeral. However, it is also undisputed that the family, in exercising those rights, knowingly conducted a public funeral in a public place and knowingly and intentionally had the casket of Sgt. Brinlee opened for viewing by the more than 1,200 persons attending the funeral. It is further undisputed that the family allowed members of the press to attend and provided an area at the rear of the auditorium for the press to be located. It was from this area that Defendant Turnley took the photograph of Sgt. Brinlee's open casket which was viewed by most of the persons in attendance at the public funeral, which was published as one of 20 photographs in the photo-essay 'THE BEREAVED" and which is at the heart of each of Plaintiffs' claims.

McCormack v. Oklahoma Pub. Co., 1980 OK 98, 613 P.2d 737, does not "support[ ] Robert Showler's and Johnny

Davidson's common law causes of action for invasion of privacy and misappropriation." *Pltf. Resp.* at p. 12. While the *McCormack* decision outlines and defines Oklahoma's recognition of invasion of privacy torts, it certainly does not support the Plaintiffs' claims in this case. In *McCormack, supra,* Oklahoma adopted the Restatement (Second) of Torts Section 652A and all four privacy torts. Section 652I defines the Personal Character of the Right of Privacy and states: "Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded." RESTATEMENT (SECOND) OF TORTS § 652I (emphasis supplied). Following these fundamental principals, courts have had no problem rejecting privacy claims, like the Plaintiffs' here, that are brought by survivors. *Cordell v. Detective Publications, Inc.,* 419 F.2d 989 (6th Cir. 1969) (finding that a mother could not maintain a survivor privacy claim based on a magazine article that published a "sensational" account of her daughter's murder, even if the publication caused the woman emotional distress); *Tyne* v. *Time Warner Entertainment,* 336 F.3d 1286 (11th Cir. 2003) (Florida adopted the "general rule" barring survivor privacy claims). In short, any privacy claims that could arise out of photographs of Sgt. Brinlee would be personal to him. Any such claims would not survive his death and courts are uniform in not extending such claims to survivors. For this fundamental and most basic reason, Plaintiffs' privacy claim fails.

Plaintiff relies on *Gilbert v. Medical Economics Company,* 665 F.2d 305 (10th Cir. 1981) for the standards to be applied in striking a balance between the right of the press to disseminate newsworthy information to the public and the right of an individual to keep information private. *See, Gilbert, supra* at 307. Plaintiffs' reliance is misplaced since *Gilbert* does not deal with misappropriation of the right of

publicity, the only claim which may be brought on behalf of a deceased person. Even if *Gilbert* applied to a case like Plaintiffs', according to its standards, no liability can be imposed on the Defendants as it supports the very type of news reporting reflected in the photo essay "THE BEREAVED".

Not surprisingly, Plaintiffs ignore *Gilbert's* result, that publication of highly private information regarding the plaintiff's psychiatric history could not give rise to an invasion of privacy claim since the medical records were public. The Plaintiffs also omit the holding in *Gilbert* which extends First Amendment protection to newsworthy private facts:

> The [First Amendment] privilege does immunize the reporting of private facts, however, when discussed in connection with "matters of the kind customarily regarded as 'news.' [Restatement (Second) of Torts § 652D] Comment (g). Any information disseminated "for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published," is also protected by the privilege. Comment (j).
>
> Thus, it is clear from the foregoing that the First Amendment protects the publication of private facts that are "newsworthy," that is, of legitimate concern to the public. See, *Time, Inc. v. Hill*, 385 U.S. 374, 388-89, 87 S. Ct. 534, 542-43, 17 L.Ed.2d 456 (1967). This standard has been accepted by other courts. See, *E.G., Campbell v. Seabury Press*, 614 F.2d 397, 397 (5th Cir. 1980); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975), cert. denied, 425

> U.S. 998, 96 S. Ct. 2215, 48 L.Ed.2d 823 (1976). In our view this standard properly restricts liability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press to properly exercise effective editorial judgment. This standard provides a privilege for truthful publications that ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest. [emphasis supplied]

Id. at 308.

In *Gilbert,* the 10th Circuit Court of Appeals affirmed summary judgment which was granted for the media defendant where the plaintiff doctor complained that the defendant's publication invaded her privacy by including her name, photograph, and certain private facts about her life in an article concerning the alleged "collapse of self-policing by physicians and of disciplinary action by hospitals and regulatory agencies." *Id.* at 306. The *Gilbert* court found that

> . . . to properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest. When these conditions are satisfied, the facts in the publication and inferences reasonably drawn there from fall within the ambit of First Amendment protection and are privileged.

Id. at 308.

Shulman v. Group W. Productions, Inc., 955 P.2d 469 (Cal. 1998) involved a traditional invasion of privacy (disclosure of private facts) and intrusion claim; not a

misappropriation of likeness claim. Rejecting Shulman's argument that the reporting of her private medical information was not "necessary," the court unequivocally stated, "[t]he standard ... is not necessity." *Shulman* at 229.

> That the broadcast could have been edited to exclude some the [the plaintiff's] words and images and still excite a minimum degree of viewer interest is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press.

Id. Moreover, "it is not for a court or a jury to say how a particular story is best covered," the media is given "broad discretion to publish matters that are of legitimate public interest," and the newsworthiness test "incorporates considerable deference to reports and editors." *Id* at 225.

While Oklahoma, like many states, recognizes a statutory right of privacy providing a civil right of action for the use of a name or picture for advertising without consent, exercise and enforcement of this right of action must defer when confronted with the First Amendment right of the press to cover and publish lawfully obtained and truthful reports about matters of public interest and importance. *Bartnicki, supra.* As demonstrated in Defendants' Motion for Summary Judgment, New York, with statutes virtually identical to 21 O.S. § 839.1, et seq., recognizes the supremacy of the First Amendment protections in this area. *See, Hoepker v. Kruger,* 200 F.Supp. 2d 340 (S.D.N.Y. 2002); *Messenger, ex rel Messenger v. Gruner + Jahr Printing and Pub.,* 727 N.E.2d 549 (N.Y. 2001). New York Courts have consistently found

"newsworthiness" and "public interest" exceptions to exist under the First Amendment.

> [W]e have made clear that these sections do not apply to reports of newsworthy events or matters of public interest ..." This is because a newsworthy article is not deemed produced for the purposes of advertising or trade. Additionally, these principles reflect "constitutional values in the area of free speech" (citing case).

Messenger, supra. .

> The advertising and trade limitation in New York's privacy statutes was crafted with the First Amendment in mind. Through Sections 50 and 51, the New York legislature sought to protect a person's right to be free from unwarranted intrusions into his or her privacy, while at the same time protecting the quintessential American right to keedom of expression. [citations omitted]

* * *

> In the end, free speech rights clearly transcend privacy rights when speech concerns "newsworthy evens or matters of public interest." *Stephano v. News Group Publications, Inc.*, 485 N.Y.S.2d 220,224-25 (1984) ....

Hoepker v. Kruger, 200 F.Supp.2nd 340 (S.D.N.Y. 2002).

Oklahoma courts, and respectfully, this Court, should follow the lead of the New York court's in interpreting the provisions of 21 O.S. § 839.1, et seq. to ensure that claims

made for use of a name or picture without consent be held actionable only when used for advertising purposes and not within the broad constitutional exception for "newsworthy" uses. The photograph of Sgt. Brinlee in a news photo-essay in a national magazine falls squarely within the newsworthiness exception and is entitled to full constitutional protection.

Based on Plaintiffs' allegations alone, it is clear that the information covered by Turnley and Harper's was public, not private. Plaintiffs' admit that the death and remembrance of Kyle Brinlee was newsworthy. *See, Pltf. Resp. at p. 7.* In this case, the open and flag draped casket of Sgt. Brinlee was the focal point of the public funeral conducted in the Pryor High School auditorium where the Plaintiff had provided for an area of the auditorium to be reserved for the working press. The social value of the facts published in this case revolves around the important and newsworthy subjects of America's war in Iraq, the participation of Oklahoma soldiers in the conflict and the ultimate sacrifice paid by Oklahoma Sgt. Kyle Brinlee and others killed in the line of duty. Further, the public outpouring of grief and support surrounding Sgt. Brinlee's death provided an independent social value of the photographs published in this case. The public notoriety in this case arose from Sgt. Brinlee's honorable service and his ultimate sacrifice on behalf of his fellow citizens and his country. He was the first Oklahoma Army National Guardsman killed since the Korean Conflict. Like all other American heroes who lost their lives while performing the difficult duties of American combat soldiers, Sgt. Brinlee's funeral in Pryor, Oklahoma was something of importance and interest to the American people.

The Defendants' constitutionally protected right to take and publish the photograph of which Plaintiff complains, is strengthened by the active consent and participation of the

Plaintiffs in opening the casket of the deceased Sgt. Brinlee and making that visual image, not just available for public view, but virtually inescapable for the more than 1,200 persons who attended the public funeral as they exited the Pryor High School auditorium. Plaintiffs do not allege, nor could they, that Defendants or anyone unrelated to Sgt. Brinlee's family had anything to do with the casket being opened for public view. Defendants covered the news story which was presented and did so in a reasonable manner and a manner respectful to the fallen American solider, Sgt. Brinlee.

In Neff v. Time, Inc., 405 F.Supp. 858 (W.D. Pa. 1976) the court held:

> A factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities. The constitutional privilege protects all truthful publications relevant to matters of public interest. *Jenkins v. Dell Publishing Co., supra,* family of victim of a murder: *Samuel v. Curtis Pub. Co.*, 122 F.Supp. 327 N.D.Cal. 1954), plaintiff attempting to dissuade woman hanging on bridge from committing suicide; *Berg v. Minneapolis Star & Tribune Co.*, 79 F.Supp. 957 (Minn. 1948), courtroom; *Gill v. Hearst Pub. Co.*, 40 Cal.2d 224, 253 P.2d 441 (1953), plaintiff embracing his wife in a market place; *Jacova v. Southern Radio & Television Co.*, 83 So.2d 34 (Fla.1955), cigar store raid; *Thermo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940); police station; *Murray v. N. Y. Magazine Co., supra,* parade; *Humiston v. Universal Film Mfg. Co.*, 189 App÷. 467, 178 N.Y.S. 752 (1919), street; *Meetze v. Associated Press,* 230 S.C. 330, 95 S.E.2d 606

> (1956), article reporting birth to 12 year old child; *See* The Law of Torts, by W. L. Prosser, Fourth ed. 1971 at pp. 811, 817. *Cf. Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975). [emphasis supplied]

Id. at 861.

In *Neff* the plaintiffs claim was based on "appropriation of name or likeness" and "publicity given to private life," . . .

> It is settled that this section is not applicable when a person's picture is used in a non-commercial article dealing with an accident, or the picture of a bystander at a political convention, or parade, *Murray v. N.Y. Magazine Co.*, 27 N.Y. 2d 406, 318 N.Y.S. 2d 474, 267 N.E. 2d 256 (1971), or generally in the reporting of news. . . . . The fact that *Sport's Illustrated* is a magazine published for profit does not constitute a "commercial appropriation of *Neff's* likeness." The fact that Neff was photographed in a public place for a newsworthy article, entitles the defendant to the protection of the First Amendment. *Time, Inc. v. Hill*, 385 U.S. 374, 397, 87 S.Ct. 534,17 L.Ed.2d 456 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct 710, 11 L.Ed.2d 686 (1964). The tort described in 4, *supra*, and § 652.C Restatement (2nd) of Torts is not applicable to the facts in this case. [emphasis supplied]

Id. at 861.

Publication of public events cannot invade one's privacy. *Bartnicki,* 532 U.S. at 534.[4] The Oklahoma Supreme Court has underscored the constitutional protections afforded the press to cover and publish public events and facts. In *McCormack* v. *Oklahoma Publishing Co., supra,* the Court found:

> The United States Supreme Court has said that "the interests of privacy fade when the information involved already appears on the public record," and concluded that "once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 1046, 1047, 43 L.Ed.2d 328 (1975). Further, the Restatement of Torts (Second), Section 252D, which we adopt today, states, "There is no liability for giving publicity to facts about the plaintiff's life which are matters of public record."

1980 OK 986, 13 P.2d 737 (1980) at ¶ 18.

Sgt. Brinlee's funeral was a public event. Plaintiffs admit that they controlled the funeral service. The very photograph about which Plaintiffs complain shows Oklahoma Governor Brad Henry exiting the Pryor High School Auditorium and walking with others back toward the flagdraped casket of Sgt.

---

[4] "In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: 'The right of privacy does not prohibit any publication of matter which is of public or general interest.' The Right to Privacy, 4 Harv. L.Rev. 193, 214 (1890). One of the costs associated with participation in public affairs is an attendant loss of privacy [emphasis supplied]."

Brinlee's that previously had been opened at Plaintiffs' direction and with their consent. The Plaintiffs are trying to convert a public event to a private event after the event has occurred. History cannot be changed.

III.The Protection of The First Amendment is Paramount

In a case such as this one, where Plaintiffs attempt to state claims against the press for having lawfully covered and published newsworthy public information gathered in a public setting, the First Amendment by and through the Fourteenth Amendment to the United States Constitution sets forth undeniable protections for the press and rigorous standards for Plaintiffs' claims. In case after case, the United States Supreme Court has reaffirmed the protections of the Press which are part and parcel of the First Amendment.

> Our opinion in *New York Times v. Sullivan,* 376 U.S. 254 (1964), reviewed many of the decisions that settled the 'general proposition that freedom of expression upon public questions is secured by the First Amendment.'" *Id.* at 269. *see Roth v. United States,* 354 U.S. 476, 484 (1957); *Bridges* v. *California,* 314 U.S. 252, 270 (1941); *Stromberg v. California,* 283 U.S. 359, 369 (1931). Those cases all relied on our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open...."

Bartnicki, 532 U.S. at 534.

The photo essay was intended to address the subject of the cost of the Iraq war to the families of combatants on both sides. As Harper's editor, Lewis Lapham, testified in his

deposition, ". . . there is a cost of war, the sorrow of war falls not only on the people in Iraq but also on Americans who fight the war, and their loss is a tragedy." *Lapham Depo.* at p. 35, ll. 18-21.

IV. Conclusion

Defendants' Undisputed Material Facts and Plaintiffs' own allegations bring their claims under the scrutiny of the First Amendment and its protections for the press in general and Harper's and Turnley in particular. The truth is that Oklahoma Army National Guardsman Sgt. Brinlee was tragically killed in the line of duty while serving his country in Iraq. The funeral for Sgt. Brinlee was intentionally scheduled for the public venue of the Pryor High School Auditorium where more than a 1,200 "mourners and attendees" were allowed to attend, observe and pay their respects. The Governor of the State of Oklahoma and the Oklahoma Army National Guard's Commander in Chief, attended and spoke at the funeral. The Plaintiffs chose to open the flag-draped casket of Sgt. Brinlee and place it at the main exit of the Pryor High School Auditorium where the Governor and his staff, and then the more than 1,200 attendees, were allowed to file past the open casket as they exited the funeral. The Plaintiffs allowed and arranged for a separate area in the back of the auditorium for the working press, including Peter Turnley. From the press area Peter Turnley took photographs, including the one complained about by the Plaintiffs of the open casket and the Governor which was published by Harper's Magazine in a news photo-essay called "THE BEREAVED - Mourning the Dead in America and Iraq."

There could be no clearer case for the application of the First Amendment protections provided to the press for

coverage and publication of public and newsworthy information in stories of importance and interest to the American public. There is nothing brought forth in Plaintiffs' Response that would override this constitutional guarantee of free expression or restrict the freedom of the press from reporting on newsworthy events. Based on the Undisputed Material Facts set forth in Defendants' Motion for Summary Judgment and unchallenged by Plaintiffs' Response, Harper's Magazine and Peter Turnley are entitled to judgment as a matter of law.

Respectfully submitted,

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APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 06-7001

[Filed March 9, 2006]

ROBERT SHOWLER and JOHNNY DAVIDSON, Individually and as Special Administrator of the Estate of Kyle Adam Brinlee, Appellants,	)
v.	)
HARPER'S MAGAZINE FOUNDATION, PETER TURNLEY, Individually and in his capacity as a Contributing Editor to HARPER'S MAGAZINE, Appellees.	)

On Appeal from the United States District Court for the Eastern District of Oklahoma

The Honorable Frank H. Seay
District Judge

D.C. No. 05-178-S

APPELLANTS' OPENING BRIEF
(ATTACHMENTS INCLUDED IN
SCANNED PDF FORMAT)

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PRIOR RELATED APPEALS

There are no prior or related appeals arising from the facts or circumstances underlying the claims asserted by Appellants, Robert Showler and Johnny Davidson.

STATEMENT OF JURISDICTION

On December 22, 2005, the Honorable Frank H. Seay, Judge of the District Court, entered summary judgment in favor of the Defendants (Doc. 97, Order Granting Motion for Summary Judgment attached hereto at p.33; Doc. 99, Judgment In Favor of Defendants attached hereto at p.54)[1]. Plaintiffs' Notice of Appeal was filed on December 30, 2005 (Doc. 98). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court committed reversible error in granting summary judgment against Plaintiffs when an issue of material fact remained in dispute.

2. Whether the District Court erred in finding that the First Amendment protects information which is obtained as a result of tortious acts.

3. Whether the District Court misapplied principles of agency law to the instant case.

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[1] Citations to the Eastern District Docket Sheet are designated (Doc.).

4. Whether the District Court committed reversible error by improperly analyzing and holding that Defendants' actions did not support Plaintiffs' claims for invasion of privacy; intentional infliction of emotional distress; unjust enrichment; and negligent hiring, retention, and supervision.

STATEMENT OF THE CASE

On April 25, 2005, Plaintiffs filed their Complaint in the United States District Court for the Eastern District of Oklahoma (hereinafter "District Court") (Doc. 1). The Complaint was amended on June 14, 2005 (Doc. 21). Defendants filed a Motion for Summary Judgment on October 31, 2005 (Doc. 49). The Complaint was amended again on November 1, 2005, to assert claims for: Count I, Intentional Infliction of Emotional Distress; Count II, Invasion of Privacy; Count III, Violation of 21 O.S. §839.1; Count IV: Fraudulent/False Misrepresentation; Count V: Constructive Fraud, Fraud and Deceit; Count VI: Unjust Enrichment; Count VII: Negligence; and Count VIII: Negligent Hiring, Retention, and Supervision (Doc. 53). On November 10, 2005, Defendants filed a Motion for Summary Judgment on the Second Amended Complaint (Doc. 64) which was subsequently granted by the Honorable Frank H. Seay, District Judge (Docs. 97 & 99). Plaintiffs' Notice of Appeal was filed on December 30, 2005 (Doc. 98).

STATEMENT OF THE FACTS

Sergeant[2] Kyle Adam Brinlee, a soldier with the 90th Troop Command, Oklahoma Army National Guard, was

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[2] Kyle was promoted posthumously from Specialist to Sergeant.

killed in action in Iraq on May 11, 2004, when an IED exploded near his vehicle (Aplt. App. at 17, ¶8). Robert Showler, Kyle's biological father, and Johnny Davidson, Kyle's Grandfather and Personal Representative, hired Stephens Memorial Chapel in Pryor, Oklahoma, to handle the funeral arrangements so the family could grieve without being burdened by funeral arrangements (Aplt. App. at 444). On May 13, 2004, Showler, Davidson, and other members of Kyle's family met with Rick Stephens of the Stephens Memorial Chapel to discuss funeral arrangements (Aplt. App. at 444-46, 448, & 468). Showler and Davidson instructed Rick Stephens that they did not want anyone taking pictures of Kyle's open casket, and that they did not want to be bothered by members of the media (Aplt. App. at 451 & 467).

Prior to the funeral, the Defendant Peter Turnley, on behalf of Harper's Magazine, made at least three telephone calls to the Stephens Memorial Chapel in an attempt to get permission to attend Kyle Brinlee's funeral (Aplt. App. at 485-489). During one of these telephone calls, Defendant Turnley spoke with Rick Stephens (Aplt. App. at 470, 485, & 489). During their telephone conversation, Turnley introduced himself as a photographer with Harper's Magazine and requested permission to attend the funeral (Aplt. App. at 470 & 488). Stephens gave Turnley permission to attend and told Turnley that the family did not want to be approached or contacted during the funeral service (Aplt. App. at 470 & 489). Stephens also told Turnley that he could only take pictures from the area reserved for the press (Aplt. App. at 490) and that Turnley could not take photographs of the open casket (Aplt. App. at 470-471 & 473). Turnley acknowledged and agreed to these restrictions (Aplt. App. at 474). Nevertheless, Turnley now denies that he was told not to photograph Kyle's open casket (Aplt. App. at 483-84 & 489).

However, Turnley admits that he was given and agreed to abide by the other two restrictions (Aplt. App. at 489-90).

Kyle's funeral was held on May 19, 2004, at the Pryor High School Auditorium (Aplt. App. at 17, ¶9). Rick Stephens spoke with Turnley again on the day of the funeral (Aplt. App. at 471). As part of the funeral arrangements, Rick Stephens designated an area for the press including Turnley at the back of the Pryor High School Auditorium (Aplt. App. at 469). Despite the restrictions imposed by the family and conveyed to Turnley by Mr. Stephens, Turnley took multiple photographs of Kyle in his open casket (Aplt. App. at 482). Turnley also left the area reserved for the press and took photographs of Kyle's open casket from the auditorium's sound and lighting control booth (Aplt. App. at 495-99). Contrary to the family's instructions to which Turnley had agreed, Turnley also approached Mr. Showler at the grave site (Aplt. App. at 449 & 480). While speaking with Mr. Showler following the graveside service, Turnley offered to send Mr. Showler the photographs he had taken, but Turnley did not disclose to Mr. Showler that he had taken multiple photographs of Kyle's open casket (Aplt. App. at 450 & 536- 38).

Harper's Magazine and Turnley published a photograph of Kyle's open casket in its August 2004 edition with the caption, "The casket of SPC. Brinlee at funeral services in a high school auditorium in Pryor, Oklahoma." (Aplt. App. at 505). Though Defendants argue that the presence of Oklahoma's Governor in the photograph is significant to this case, there is nothing within the photograph or its caption that identifies Governor Henry (Aplt. App. at 505). There is no dispute that Defendants did not have permission to publish an open casket photograph of Kyle in the August 2004 issue of *Harper's Magazine* or at any time (Aplt. App. at 22, ¶34;

470-71, & 473). Defendant Turnley never told Mr. Showler that he intended to mail Mr. Showler numerous photographs of Kyle's open casket (Aplt. App. at 450). Mr. Showler first learned that Defendant Turnley had taken multiple open casket photographs when copies of the photographs arrived in the mail at his residence (Aplt. App. at 455-57). On August 7, 2004, Courtney Neal, Kyle's aunt, emailed Defendant Turnley setting forth her vehement objections to the photograph of Kyle's open casket that was published by Defendant Turnley and *Harper's Magazine* (Aplt. App. at 491-92 & 542). Despite knowing that Kyle's family objected to the taking of open casket photographs and the subsequent publication of one of those photographs, Defendants continued to promote the photo-essay containing the open casket photograph including conducting numerous interviews with both local and international news agencies, appearing on multiple television programs, and entering the photograph in numerous competitions (Aplt. App. at 510-34). Defendants even had the audacity to sell the photographic essay with the photograph of Kyle's open casket to a French magazine *Le Monde 2* wherein it was subsequently published (Aplt. App. at 510-34 & 544-45). Consequently, Mr. Showler, Mr. Davidson and Kyle's family have been damaged by Defendants' conduct.

SUMMARY OF THE ARGUMENT

The first section of this brief demonstrates how the District Court erred in granting summary judgment in this case when there remained a genuine issue of material fact in dispute. Plaintiffs' agent, Rick Stephens, testified that he told Turnley not to take photographs of Kyle Brinlee's open casket, and that Turnley agreed to this restriction as a condition to attending the funeral. Defendant Turnley, however, disputes this fact. The District Court accepted as

true Turnley's rendition of the facts, failing to recognize the existence and significance of this disputed material fact, and granted Defendant's Motion for Summary Judgment. However, every cause of action asserted by Plaintiffs turns on this single, disputed fact. Should a jury choose to believe Mr. Stephens and Plaintiffs evidence, it could legally find in Plaintiffs favor on each cause of action. In another instance, the Court relied upon a fact that is not supported by the record.[3] Summary judgment was not proper in this case.

The second section of this brief demonstrates that the District Court erred by concluding that the First Amendment protects the use and publication of information which is obtained by tortious and/or unlawful acts. The U.S. Constitution does not provide newsmen and newswomen immunity from obeying laws of general applicability which bind every other citizen in this country. Showler and Davidson placed restrictions on members of the press who wanted to attend the funeral. As a member of the press, Turnley agreed to these restrictions and then ignored them. In so doing, his conduct became intentionally tortious, removing it from protection of the First Amendment.

The third section of this brief demonstrates how the District Court erred by finding that principles of agency law do not apply to the instant case. Plaintiffs allege that Turnley's agreement to abide by the restrictions placed upon him by Plaintiffs' agent, Rick Stephens, constitutes fraud and

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[3] The Court repeatedly mentions that Plaintiffs invited the press to attend the funeral. Not only is the record void of proof to support this "fact", but it is not true. What the record does reflect is that members of the press were taking the initiative themselves to contact Mr. Stephens and request to attend the funeral (Aplt. App. at 448 & 467).

misrepresentation to Plaintiffs. However, the District Court held that "it is factually impossible for the plaintiffs to have relied upon a statement by Turnley when admitting him to the funeral" since Turnley conveyed his promise to Mr. Stephens, not Mr. Showler or Mr. Davidson. The District Court went on to state that it "has found no case law to support this [Plaintiffs'] position." Based upon this faulty premise, the District Court summarily granted judgment against Plaintiffs. However, it is undisputed in this case that Rick Stephens was the Plaintiffs' agent. Jurisprudence holds that a statement, fraudulent or otherwise, which is made to a principal's agent, is deemed to have also been made to the principal. Relying on Turnley's statement to Mr. Stephens that Turnley would abide by the family's restrictions, Plaintiffs permitted Turnley to attend the funeral service. Turnley's subsequent actions are evidence that he never intended to abide by the family's restrictions, thereby materially misleading Plaintiffs.

The final section in this brief demonstrates how the District Court erred by improperly analyzing and finding that Defendants' actions did not support Plaintiffs' claims for invasion of privacy; intentional infliction of emotional distress; unjust enrichment; and negligent hiring, retention, and supervision. The Court once again substituted its judgment about factual issues in place of a jury's judgment, thereby misapplying applicable case law.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment. S. Hospitality, Inc. v. Zurich Am. Ins. Co., 393 F.3d 1137, 1139 (10th Cir. 2004). This Court "must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. Where different ultimate issues may be drawn, the case is not

one for summary judgment." Norton v. The City of Marietta, Oklahoma, 432 F.3d 1145, 1152 (10th Cir. 2005). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Essary v. Fed. Express Corp., 2006 WL 31128, *3 (10th Cir. 2006). "The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party." Tademy v. Union Pacific Corp., 2006 WL 325376 (D. Utah 2006) citing Celotex Corp. v. Catrett, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party need not present evidence that would be admissible at trial to avoid summary judgment. See, Celotex, 477 U.S. at 324. This Court will "view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." Sims v. Oklahoma ex rel. Dep't of Mental Health and Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999). An issue of fact is 'genuine' only if the nonmoving party presents facts such that a reasonable jury could find in favor of the nonmovant. See, Garrison v. Gambro, Inc., 428 F.3d 933, 935 (10th Cir. 2005).

ARGUMENT AND AUTHORITY

I.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFFS WHEN ISSUES OF MATERIAL FACT REMAINED IN DISPUTE.

The District Court ignored a genuine issue of material fact when it entered summary judgment for the Defendants. That genuine issue of material fact is whether Turnley was told and agreed not to take photographs of Kyle's open casket. This issue of fact is the cornerstone of every cause of action asserted by Plaintiffs. If Turnley was, in fact, given this restriction but ignored it, his conduct was tortious and is not entitled to protection under the First Amendment. Likewise, if Turnley was told not to take the open casket photographs, then his conduct was "outrageous"; it violated Plaintiff's right to privacy; and Turnley's agreement to abide by this restriction was fraudulent, among other things. Because a reasonable jury could conclude that Plaintiffs' agent, Mr. Stephens, told Turnley not to take the photographs at issue and that Turnley purportedly agreed to this restriction, summary judgment was not proper.

Defendants have failed to meet their burden of establishing the nonexistence of a genuine material fact. Plaintiffs have presented sworn testimony by Mr. Stephens that he told Turnley that he could attend Sgt. Brinlee's funeral so long as he complied with three conditions: (1) that he not approach the family; (2) that pictures only be taken from the reserved press area; and (3) that no pictures be taken of Kyle's open casket (Aplt. App. at 470-71, 473, & 489-90).

Turnley admits that he was informed of the first and second conditions (Aplt. App. at 489-90). However, he denies ever being told about the third condition (Aplt. App. at 483-84 & 489). This is a genuine issue of material fact. Furthermore. the District Court failed to view the evidence and draw reasonable inferences in the light most favorable to the nonmoving party. Therefore, the District Court committed reversible error by granting summary judgment.

The United States Supreme Court in Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986) stated:

> Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

(internal citations omitted). The District Court weighed the disputed evidence and drew inferences rather than allowing a jury to perform these functions. Additionally, the District Court reached and relied upon at least one factual conclusion that was not supported in the record [see footnote no. 3]. Tenth Circuit jurisprudence holds that reversible error is committed when the Judge goes beyond the undisputed facts in the record and makes its own findings which are not supported by the same record. See, e.g., N. Texas Prod.

Credit Assoc. v. McCurtain County Nat'l Bank, et.al., 222 F.3d 800 (10th Cir. 2000); Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997). Since a jury could reasonably conclude from the Plaintiffs' evidence that the Plaintiffs, through their agent Mr. Stephens, informed Turnley of the three restrictions; that Turnley heard, understood and agreed to all three restrictions; that Turnley either intentionally or fraudulently disregarded and violated these restrictions; and in so doing, that the Defendants violated the Plaintiffs' rights. Therefore, this case should be determined by a jury and summary judgment was not proper.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT THE FIRST AMENDMENT PROTECTS NEWSWORTHY INFORMATION WHICH IS UNLAWFULLY OBTAINED.

There is no First Amendment protection for information which is obtained by tortious or unlawful conduct. Indeed, the United States Supreme Court has held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." Cohen v. Cowles Media Co., 501 U.S. 663, 669, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991). If Defendant Turnley was told not to take the photographs at issue, agreed to this restriction, yet did so anyway, he unlawfully obtained them. Defendants may not violate laws of general applicability simply so they can get their story. A jury could reasonably conclude that Defendants violated the Plaintiffs' right of privacy by taking and publishing the open casket photographs; that Defendants' conduct rose to an 'outrageous' level since their actions violated the express restrictions imposed by the family; and/or

that Turnley fraudulently represented his agreement to abide by Plaintiffs' restrictions about open casket photographs solely to gain entrance to the funeral. The District Court erred by holding otherwise.

The Oklahoma Court of Criminal Appeals, following the United States Supreme Court, as well as Federal District Courts, and Federal Courts of Appeal, has held that:

> The First Amendment has never been construed to accord newspersons immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass . . . Crimes and torts committed in newsgathering are not protected. There is no threat to a free press in requiring its agents to act within the law.

Stahl v. State, 665 P.2d 839, 841-42 (Okla. Crim. App. 1983) (internal citations omitted). The United States Supreme Court has also specifically held that:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. **The Court has emphasized that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.**

Branzburg v. Hayes, 408 U.S. 665, 682-83, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972) (emphasis added). The Court in

Branzburg went on to state that, "[t]he prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish." Id., 408 U.S. at 684.[4] The Branzburg Court followed its prior ruling in Cohen and went on to hold:

> . . . generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. As the cases relied upon by respondents recognize, the truthful information sought to be published **must have been lawfully acquired.**

Id., 501 U.S. at 669 (emphasis added).

In this instance, Defendants did not lawfully acquire the open casket photographs of Kyle. If a jury were to believe Mr. Stephens' testimony, it could find that Defendants acted unlawfully by lying to Plaintiffs. Turnley was told by Mr. Stephens not to photograph the open casket and he fraudulently promised not to do so (Aplt. App. at 470-71, 473-74, & 489). Instead of recognizing that a jury could reach a different conclusion, the Court gave Defendants First Amendment protection. In doing so, the District Court relied solely upon its own determination that the photograph was

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[4] See also, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Gallella v. Onassis, 487 F.2d 986 (2nd Cir. 1973); Miller v. Nat'l. Broad. Co., 187 Cal.App.3d 1463 (Cal. Ct. App. 1986); Shulman v. Group W Prod., Inc., 18 Cal.4th 200, 74 Cal.Rprt.2d 843, 955 P.2d 469 (Cal. 1998); LeMistral, Inc. v. Columbia Broad. Sys., Inc., 61 A.D.2d 491, 402 N.Y.S.2d 815 (N.Y. Sup. Ct. 1978); Anderson v. WROC-TV, 109 Misc.2d 904, 441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981).

"newsworthy" and ignored the fact that the photograph was obtained through the commission of a tort.

The District Court's Order boldly asserts that, "Plaintiffs had the right to control the burial of their loved one, but chose to toss control of the event to the wind and even sought celebrity of politicians and the public." (Aplt. App. at 586). Once again, a jury could reach an entirely different conclusion based upon the testimony of Mr. Stephens. Contrary to the District Court's mischaracterization of the decedent's funeral, members of the press were allowed, not invited, to attend the funeral in a restricted capacity only. The press was required to sit in a designated area, was not allowed to take pictures of the open casket, and was not allowed to approach the decedent's family (Aplt. App. at 470- 71, 473, & 489-90). The District Court relied heavily on the fact that Oklahoma Governor Brad Henry attended Kyle Brinlee's funeral. However, the act of inviting the Governor to a funeral which was historically significant for the State of Oklahoma does not constitute "seeking celebrity" or "tossing control of the event to the wind". Furthermore, Governor Henry was Kyle's Commander-in-Chief and, as such, arguably had a duty to attend the funeral. Plaintiffs imposed specific restrictions on the press which were communicated to Defendant Turnley who proceeded to disobey them. Consequently, Defendant Turnley's actions were either intentionally tortious or fraudulent; indeed, unlawful.

Turnley testified that he approached Kyle's family at the conclusion of the interment service. This conduct violated one of the restrictions placed upon the press to which Turnley had agreed (Aplt. App. at 449 & 480). Turnley also took photographs of Kyle's open casket from an area outside of the area reserved for the press (Aplt. App. at 495-99). This act also violated a restriction placed upon the press to which

Turnley had agreed (Aplt. App. at 474). It is also undisputed that no other photographers took photographs of the open casket. These facts provide strong circumstantial evidence that Turnley was, indeed, told not to take the photographs at issue and, in doing so, acted tortiously. While Plaintiffs do not have to present evidence that would be admissible at trial to avoid summary judgment, these facts place Defendant's burden of proof out for purposes of the Motion of reach. See, Celotex, 477 U.S. at 324. With this circumstantial evidence and Stephen's testimony, a jury could reasonably conclude that Turnley, through fraud or misrepresentation, wholly disregarded the express instructions of Kyle Brinlee's family. Therefore, the District Court's order granting summary judgment is reversible error.

The District Court also ruled that Sergeant Brinlee's funeral was a newsworthy event. On this, the Court quoted Bartnicki v. Vopper, 532 U.S. 514, 528, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001), which reads in part:

> More specifically, this court has repeatedly held that "if a newspaper **lawfully** obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order. . .

(emphasis added). (Doc. 97, Order at p.5). This effort to absolve Defendants of liability because the event may have been newsworthy disregards "an equally well established line of decisions" that the press may not violate laws of general applicability just to get the story. Branzburg, *supra*, 408 U.S. at 682-83. See also, Cohen, 501 U.S. at 669. The press is not and should never be above the law. Even assuming *arguendo* that Kyle Brinlee's funeral was a matter of public

significance, the District Court still erred because protection only extends to publications lawfully obtained. Publication of information unlawfully obtained, regardless of its newsworthiness, subjects the news gatherer and publisher to civil liability. By agreeing to and then ignoring the express restrictions placed on them by Mr. Stephens, Defendants' actions were tortious and are not entitled to First Amendment protection. Branzburg, 408 U.S. at 682-83. Therefore, this summary judgment should be reversed.

III.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY MISAPPLYING PRINCIPLES OF AGENCY LAW TO THE INSTANT CASE.

Oklahoma law clearly recognizes that a promise to a principal's agent has the same effect as if the promise was made to the principal himself. It is a genuine issue of material fact, whether Defendant Turnley was told not to take the open casket photographs and agreed to this restriction. Therefore, when Turnley assured Mr. Stephens that he would abide by the restrictions set forth above, Turnley was making that promise to Plaintiffs themselves. Accordingly, Defendants perpetrated a fraud upon the Plaintiffs. The District Court, in granting summary judgment, misapplied Oklahoma law by finding agency principles do not apply to the instant case.

Oklahoma Courts have set forth the requirements to establish a claim for fraudulent/false misrepresentation as follows:

> To recover under the theory of fraudulent misrepresentation, or deceit, a plaintiff must prove (1)

> the defendant made a material misrepresentation; (2) that it was false; (3) the defendant made the representation knowing it was false or in reckless disregard of the truth; (4) that the defendant made it with the intention that it should be acted upon *by the plaintiff*;(5) that *plaintiff* acted in reliance upon it; and (6) that plaintiff thereby suffered injury.

Sturgeon v. Retherford Publ'ns, Inc., 987 P.2d 1218, 1228 (Okla. Civ. App. 1999), *citing* Ramsey v. Fowler, 308 P.2d 654 (Okla. 1957). In discussing the requirements for constructive fraud, fraud, and deceit, the Oklahoma Courts have held, "It is equally well settled that the concealment of material facts which one is bound under the circumstances to disclose, may constitute fraud." Varn v. Maloney, 516 P.2d 1328, 1332 (Okla. 1973). Further,

> Constructive fraud is statutorily defined in Oklahoma as 'any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him by misleading another to his prejudice, or to the prejudice of anyone claiming under him.' 15 O.S. 1991, §59.

N.C. Corff P'ship, Ltd. v. OXY USA, Inc., 929 P.2d 288, 296 (Okla. Civ. App. 1996).

Oklahoma Courts have never held that fraudulent statements or material misrepresentations cannot be made to the agent of the principal. Quite to the contrary, Oklahoma Courts have long held that, "[i]f in negotiations with such agent, a fraud is perpetrated on the agent as to the matters so intrusted [sic] to the agent, the same would be a fraud on the principal." Hallam, et al. v. Bailey, 166 P.874 (Okla. 1917). Other courts from around the nation have also consistently

reached this same decision. See, e.g., Reider v. Arthur Anderson, LLP, 784 A.2d 464 (Conn. 2001); In re Fine Host Corp. Sec. Litig., 25 F.Supp.2d 61 (D. Conn. 1998); Rowan County Bd. of Educ. v. U.S. Gypsum Co., 407 S.E.2d 860 (N.C. Ct. App. 1991); Dryden Waterproofing, Inc., v. Bogard, 488 So.2d 672 (Fla. Dist. Ct. App. 1986); Chicago Title and Trust Co. v. First Arlington Nat'l Bank, 454 N.E.2d 723 (Ill. App. Ct. 1983); Liberty Nat'l Bank & Trust v. Gruenberger, 477 S.W.2d 503 (Ky. Ct. App. 1972); Robinson v. Travelers Indem. Co., 33 Cal.Rptr. 301 (Cal. Dist. Ct. App. 1963); Leeper v. Beltrami, 1 Cal.Rptr. 12 (Cal. 1959); Ward v. Barkenhagen and Others, 7 N.W. 340 (Wis. 1880).

The Restatement 2d of Agency states in §315:

> A person who fraudulently obtains a contract through, or enters into a transaction with, an agent acting within the scope of his power to bind the principal, or who by fraud causes the agent to do what would be a violation of his duty to the principal if the agent knew the facts, is subject to liability to the principal whether the fraud is practiced upon the agent or upon the principal.

It is undisputed that Plaintiffs hired Rick Stephens to coordinate the funeral of Kyle Brinlee (Aplt. App. at 444). Additionally, it is undisputed that Turnley admits to hearing and abiding by two of the three conditions placed upon his attendance at the funeral by Mr. Stephens (Aplt. App. at 489-90). In reaching its decision, the District Court's finding that Mr. Stephens was not acting as Plaintiffs' agent is clearly against the weight of authority and undisputed facts of this case. Therefore, this Court should reverse the entry of

summary judgment and allow Plaintiffs to proceed to a trial by jury.

IV.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY ANALYZING WHETHER DEFENDANTS' CONDUCT SUPPORTED PLAINTIFFS' CLAIMS FOR INVASION OF PRIVACY; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; UNJUST ENRICHMENT; AND NEGLIGENT HIRING, RETENTION, AND SUPERVISION.

The District Court committed reversible error by failing to properly analyze whether Defendants' conduct supported Plaintiffs' claims for: (A) invasion of privacy, (B) intentional infliction of emotional distress, (C) unjust enrichment, and (D) negligent hiring, retention, and supervision.

A. Invasion of Privacy

Plaintiffs' right to privacy was invaded when Defendant Turnley took, promoted, and published photographs of Kyle Brinlee in the open casket. The United States Supreme Court has clearly established that there is a right of privacy in funerals:

> We have little difficulty, however, **in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes**. . . . Family members have a personal stake in honoring and mourning their dead and **objecting to**

> **unwarranted public exploitation** that, by intruding upon their own grief, tends to degrade the rights and respect they seek to accord to the deceased person who was once their own. **In addition this well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law.** Indeed, **this right to privacy has much deeper roots in the common law** than the rap sheets held to be protected from disclosure in *Reporters Committee*. . . . We can assume Congress legislated against this background of law, scholarship, and history, when it enacted FOIA and when it amended Exemption 7(C) to extend its terms.

Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 167-69, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004) (emphasis added). The Supreme Court, in discussing the common law rights of families to protect the death images of their deceased, was not discussing the application of the statutory right to privacy created under FOIA, but rather the common law backdrop to the issues raised in the case. It is this common law right recognized by the U.S. Supreme Court, along with the statutory law of the State of Oklahoma, that Defendants have violated in this case.

Contrary to the common law, Favish, and the laws of the State of Oklahoma, the District Court found that Plaintiffs' right to privacy had not been invaded because Kyle's funeral was a newsworthy public event which could be likened to "a matter of public record" (Aplt. App. at 592). Oklahoma has long recognized a statutory right to privacy at 21 O.S. §§ 839.1 and 839.2 that extends beyond death to a defined group of persons. The Oklahoma Supreme Court has expressly adopted four causes of action for invasion of

privacy including: (1) intrusion upon seclusion, (2) appropriation of another's name or likeness, (3) unreasonable publicity given to another's life, and (4) publicity that unreasonably places another in false light before the public. McCormack v. Oklahoma Publ'g Co., 613 P.2d 737, 740 (Okla. 1980).

Title 21 O.S. § 839.1 states:

> Any person, firm **or corporation** that uses for the purpose of **advertising** for the **sale of any goods, wares, or merchandise,** or for the **solicitation of patronage** by any business enterprise, the name, portrait, or picture of any person, without having obtained, prior or subsequent to such use, the consent of such person, or, if such person is a minor, the consent of a parent or guardian, and, if such person is deceased, **without the consent of** the surviving spouse, **personal representatives,** or that of a majority of the deceased's adult heirs, is guilty of a misdemeanor.

(emphasis added). Oklahoma law does not give any special definitions to the words advertise, goods, wares, merchandise or patronage, which implies these words are to be given their ordinary, everyday meanings.

Merriam-Webster's Dictionary defines "advertise" as "to make publicly and generally known; to announce publicly especially by a printed notice or broadcast; or to call public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize: PROMOTE." Merriam-Webster Online Dictionary (2005; Merriam-Webster's Collegiate Dictionary, 10th ed. 2002). Merriam-Webster's Dictionary defines "promote" as "to present

(merchandise) for buyer acceptance through advertising, publicity or discounting." Id. Merriam-Webster's Dictionary defines a "good" as "something that has economic utility or satisfies an economic want" or "something manufactured or produced for sale." Id.

The District Court erroneously concluded that 21 O.S. § 839.1 only applies to advertising and that a newsworthy article is not deemed produced for advertising. Plaintiffs maintain that, yet again, the District Court has failed to consider the facts of the case at hand. The Defendants continually promoted *"The Bereaved"* both nationally and internationally, through print and broadcast media, as well as entering the photographs in multiple competitions (Aplt. App. at 510-34). Defendants clearly intended to promote, through print and broadcast media, the sale of *Harper's Magazine,* as well as promote themselves. Turnley appeared on multiple television programs to discuss *"The Bereaved."* (Aplt. App. at 518-20, 527-28). Defendants promoted *"The Bereaved"* in order to increase circulation of the magazine and to bolster Turnley's reputation as a photographer. By making *"The Bereaved"* known to the public for these reasons, Defendants were advertising *"The Bereaved"* or, at a minimum, soliciting patronage as contemplated under 21 O.S. §839.1. Because it is a question of fact as to whether the Defendants were advertising or soliciting patronage as contemplated under 21 O.S. §839.1, the District Court committed reversible error in entering summary judgment for the Defendants. Therefore, Plaintiffs request that the District Court's judgment should be reversed.

This Court has held that the privacy rights of individuals must be weighed against the rights or the press to report information to the public. In Gilbert v. Med. Econ. Co., 665 F.2d 305, 307 (10th Cir. 1981) (emphasis added), this Court

set forth guidelines to follow in determining whether the press has strayed outside the boundaries of First Amendment protection by stating that:

> . . . the right of the individual to keep information private must be balanced against the right of the press to disseminate newsworthy information to the public. In attempting to strike an acceptable balance between these competing interests, liability may be imposed for publicizing matters concerning the private life of another "if the matter publicized is of a kind that (a) **would be highly offensive to a reasonable person,** and (b) is not of legitimate concern to the public." Restatement 2d of Torts, § 652D (1977). As comment h points out, not all matters are of legitimate public interest: The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes **a morbid and sensational prying into private lives for its own sake with which a reasonable member of the public, with decent standards, would say that he had no concern.** Thus dissemination of non-newsworthy private facts is not protected by the first amendment.

Id. The California Supreme Court elaborated on the Tenth Circuit's decision in *Gilbert* by stating that:

> . . . all of the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element. **Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material.**

Shulman, *supra,* 995 P.2d at 493 (emphasis added). The Court went on to state that:

> . . . no constitutional precedent or principle of which we are aware gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast.

Id., at 497.

The District Court failed to accept that mourning over the death of a loved one is a deeply private matter. However, as Plaintiffs have previously discussed, the United States Supreme Court has clearly established that there is a right of privacy in funerals. Favish, *supra,* 541 U.S. at 167-169. Defendant Turnley even recognized this right by placing at least three telephone calls to the Stephens Memorial Chapel in *an attempt to obtain permission* to attend Kyle's funeral (Aplt. App. at 485-488). Clearly, Defendant Turnley himself did not believe that the funeral was a public event.

Plaintiffs fail to see how the District Court can state that the picture of Kyle Adam Brinlee laying in his open casket is related to a matter of "legitimate public interest," especially when other unobjectionable photographs of the funeral would have served the same purpose. Regardless, the question of whether the photograph is "highly offensive to a reasonable person" and is or is not of legitimate public concern is a matter for a jury's determination, especially in light of the fact that the method by which Defendants obtained the photographs, i.e., commission of a tort, remains a material disputed fact.

The District Court in its opinion stated, "[T]he court finds plaintiffs' right to privacy in burying their loved one does not outweigh the right of the public to view this newsworthy photo under these circumstances. In fact, plaintiffs appear to have put the death of their loved one in the public eye intentionally to draw attention to his death and burial." (Aplt. App. at 586). This statement by the District Court is not supported by the record but appears to be merely the District Court's opinion of Plaintiffs' motives. As discussed previously, the critical genuine issue of material fact is whether Turnley received and agreed to the restrictions placed upon his attendance at the funeral by Plaintiffs' agent, Rick Stephens. Plaintiffs' motives were not an issue to be determined by the District Court. Regardless of the District Court's opinion of the Plaintiffs, the standard which must be followed by the District Court is to grant all reasonable inferences in the light most favorable to the nonmoving party. The District Court committed reversible error by failing to allow this issue to be presented to a jury. Instead, the District Court rested its opinion in part upon the newsworthiness exception. However, as the United States Supreme Court has held, this exception is not absolute. "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." Branzburg, *supra*, 408 U.S. at 682-83. Therefore, until a jury determines whether Defendants were apprised of, agreed to, and then disregarded the instructions given by Mr. Stephens, summary judgment on Plaintiffs' right to privacy claim is inappropriate.

B. Intentional Infliction of Emotional Distress

Defendants intentionally inflicted emotional distress upon the Plaintiffs by taking, promoting, and publishing photographs taken of Kyle Brinlee in his open casket.

Oklahoma Courts recognize the right of an individual to recover damages for the tort of intentional infliction of emotional distress. To recover such damages, a plaintiff must show: (1) the defendant acted intentionally or recklessly, (2) the defendant's conduct was extreme and outrageous, (3) the defendant's conduct caused the plaintiff emotional distress, and (4) the resulting distress was severe. Computer Publ'n, Inc. v. Welton, 49 P.3d 732, 735 (Olda. 2002). The District Court erred in rendering summary judgment on this issue by, yet again, failing to consider the genuine issue of material fact of whether Defendants were apprised of, agreed to abide by, and subsequently failed to comply with restrictions placed upon their attendance at the funeral. A determination of this fact is central to determining whether Defendants' conduct was intentional or reckless in order to give rise to a claim for intentional infliction of emotional distress. Furthermore, the determination of this fact is one for a jury.

The District Court also did not properly analyze whether the Defendants' unlawful actions were sufficient to constitute intentional infliction of emotional distress. The District Court stated that Plaintiffs could not establish that "publication of the pictures was so outrageous and extreme as to go beyond all possible boundaries of decency." (Aplt. App. at 588). Resting its decision upon the fact that approximately 1200 other people who attended Kyle's funeral saw the same image, the District Court held that "Mere publication of a dead body is not enough to constitute extreme and outrageous conduct." (Aplt. App. at 588-89).

In reviewing claims for Intentional Infliction of Emotional Distress, the Oklahoma Supreme Court has held that:

> The court, in the first instance, must determine whether the defendant's conduct may reasonably be

> regarded so extreme and outrageous as to permit recovery, or whether it is necessarily so. **Where, under the facts before the court, reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in any given case has been significantly extreme and outrageous to result in liability.**

Breeden v. League Serv. Corp., 575 P.2d 1374, 1377 (Okla. 1978) (emphasis added). See also, Gaylord Entm't Co. v. Thompson, 958 P.2d 128 (Okla. 1988). Plaintiffs maintain that Defendants' conduct was outrageous and would support a claim for Intentional Infliction of Emotional Distress. Defendants' conduct, at a minimum, presented a question of fact for the jury. Breeden, 575 P.2d at 1377. By usurping control of matters which were for the jury's consideration, the District Court committed reversible error.

The District Court also erred basing its decision upon the fact that Plaintiffs did not allege that the photograph was "grotesque" (Aplt. App. at 588). The standard for determining whether a claim for Intentional Infliction of Emotional Distress exists is not whether something is "grotesque" but, rather:

> The test under this theory of recovery is whether the alleged tortfeasor's conduct "has so totally and completely exceeded the bounds of acceptable social interaction that the law must provide redress" i.e, whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'"

Worsham v. Nix, 83 P.3d 879 (Okla. Civ. App. 2003), *quoting* Miller v. Miller, 956 P.2d 887, 901 (Okla. 1998). Therefore, whether one would find the photograph taken by Defendant Turnley to be in and of itself "grotesque" is immaterial to the instant case. The pertinent inquiry is, under the facts of the case, whether the actual taking, publishing, and promoting of the photograph was outrageous. Defendant Turnley not only took photographs of Kyle's open casket but also proceeded to enter them in competitions, appeared on numerous television programs to promote his work, and even sold photographs to the French magazine *Le Monde 2* (Aplt. App. at 510-34). This conduct clearly rises to the level of being outrageous. When the District Court applied the wrong legal standard in determining this issue, it committed reversible error. This Court should so find and reverse the entry of summary judgment.

C. Unjust Enrichment

Defendants were unjustly enriched through the publication and promotion of the photograph taken of Kyle Brinlee laying in his open casket. The District Court's conclusion that the photograph deserved unlimited First Amendment protection failed to consider the disputed material fact of whether Defendants received, agreed to, and subsequently ignored certain restrictions placed upon their attendance at the funeral by Rick Stephens. Accordingly, the District Court committed reversible error by granting summary judgment for the Defendants.

Oklahoma Courts recognize the right of a party to recover damages for unjust enrichment:

> The term "unjust enrichment" describes a condition resulting from the failure of a party to make restitution

> in circumstances where it is inequitable. It is a recognized ground for recovery in Oklahoma. A right of recovery under the doctrine of unjust enrichment is essentially equitable; its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another.

N.C. Corff, 929 P.2d at 295.

Defendant Turnley used an unauthorized photograph which he took of Kyle Brinlee in his open casket to help sell an issue of *Harper's Magazine*. He also entered the photograph in numerous literary and photographic contests in addition to selling the photograph to the French magazine *Le Monde 2* (Aplt. App. at 510-34 & 544-45). Each of these actions resulted in direct pecuniary gain to the Defendants. Because this pecuniary gain was obtained at the expense of Plaintiffs' right to privacy, Plaintiffs are entitled to compensation from Defendants. This Court should so find and reverse the entry of summary judgment.

D. Negligent hiring, retention, and supervision

Harper's Magazine negligently hired, retained, and supervised Defendant Turnley. The District Court failed to consider the disputed material fact, however, in reaching its determination that summary judgment for the Defendants was proper on this cause of action. Because the determination of whether Defendant Turnley was informed of, agreed to abide by, and subsequently disregarded certain restrictions placed upon his attendance at Kyle Brinlee's funeral was central to determining whether *Harper's Magazine* negligently hired, retained, and supervised Defendant Turnley, the District

Court committed reversible error by entering summary judgment for the Defendants.

Oklahoma Courts have long recognized a cause of action for negligent hiring, retention, and supervision. See, Jordan v. Cates, 935 P.2d 289 (Okla. 1997); Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co., 621 P.2d 1155 (Okla. 1980). In determining whether an employer or principal can be liable for the negligent hiring, retention, or supervision of an employee or agent, the Oklahoma Supreme Court has stated:

> When recovery against the employer for an act of his servant is rested on prior knowledge of the servant's propensity to commit the very harm for which damages are sought, the basis of liability invoked is not respondeat superior but rather the employer's own negligence in not discharging the unfit servant.

Dayton, 621 P.2d at 1161.

Key to reaching this determination of whether Defendant Turnley committed such a "harm" is the determination of whether Defendant Turnley agreed to and subsequently violated the conditions imposed by Plaintiffs' agent, Rick Stephens. Plaintiffs maintain that the issue of whether Defendants acted tortiously and harmed Plaintiffs is an issue of fact to be determined by a jury before the merits of this cause of action can even be addressed. By finding otherwise and entering summary judgment for the Defendants, the District Court committed reversible error.

Harper's Magazine had a duty to Plaintiffs to prevent the reasonably foreseeable harm caused by their employee, agent, or apparent agent, Defendant Turnley. Plaintiffs contend that *Harper's Magazine* had, or should have had, prior knowledge

and/or been on notice of Defendant Turnley's propensity to obtain and publish controversial and objectionable photographs without permission. *Harper's* breached its duty by retaining, supervising, and permitting Defendant Turnley to submit the photograph depicting Kyle's remains at a private funeral for national publication and by continuing to promote such photograph after receiving the objection from Kyle's family.

Harper's Magazine failed to determine whether Plaintiffs consented to the publication of the photograph of Kyle's open casket. On August 7, 2004, Defendant Turnley received an e-mail from Courtney Neal, Kyle's aunt, in which she expressed her objections to the photograph of Kyle's open casket (Aplt. App. at 491-92). Despite having notice that Kyle's family objected to the taking of the open casket photographs and the subsequent publication, Defendants continued to promote the photo-essay containing the open casket photograph (Aplt. App. at 510-34). *Harper's Magazine* published the photograph of Kyle's open casket so it could reap recognition, sales, business, and profits. *Harper's* knew or should have known that such publication was against the instructions and directions of Kyle's family and would cause Plaintiffs severe emotional distress.

Ultimately, the question of whether *Harper's* knowledge of and consent to Defendant Turnley's improper actions rises to the level of negligence is a question of fact for a jury. However, before a jury can even reach this issue, a determination regarding the genuine issue of material fact must be reached. A jury must decide whether Defendant Turnley was apprised of, agreed to abide by, and subsequently disregarded the conditions placed upon his attendance at Kyle Brinlee's funeral by Plaintiffs' agent, Rick Stephens. In light of the fact that a genuine issue of material

fact remains disputed and the fact that the District Court determined issues of fact that are proper only for a jury to make, the District Court's entry of summary judgment must be reversed on this cause of action as well.

CONCLUSION

The District Court erroneously granted summary judgment in favor of the Defendants on each and every of the eight claims presented in the Plaintiffs' Complaint. Whereas the District Court did not adhere to the standard for summary judgment as set forth in Rule 56 of the Federal Rules of Civil Procedure and the case law, the District Court's entry of summary judgment should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is hereby requested by the Petitioner. The issues presented by Plaintiffs as to whether Peter Turnley and *Harper's Magazine* committed a tortious act by taking, promoting, and publishing a picture of Kyle Brinlee (Showler) in his open casket and whether such act is subject to First Amendment protection are complex. Although Plaintiffs briefing of these issues is thorough, because of the importance of the factual analysis required by law, Plaintiffs believe that oral argument should he granted as it will assist the Court.

Respectfully submitted,

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No. 06-1703

IN THE

Supreme Court of the United States

ROBERT SHOWLER and JOHNNY DAVIDSON,
Individually and as Special Administrator of the
Estate of Kyle Adam Brinlee,

Petitioners,

v.

HARPER'S MAGAZINE FOUNDATION,
PETER TURNLEY, Individually and in his Capacity
as a Contributing Editor to Harper's Magazine,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Harper's Magazine Foundation has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is not reported. The opinion of the district court (Pet. App. 22a-43a) is not reported.

REASONS FOR DENYING THE PETITION

Certiorari should not be granted in this case for the following reasons:

1. the court of appeals resolved this case on state law grounds, and no federal question is presented for review;

2. *National Archives and Records Admin. v. Favish* has no application to this case;

3. Respondents are private actors, and therefore Petitioners' citation of *Roe v. Wade* and other constitutional "right of privacy" cases has no application; and

4. the court of appeals applied the appropriate standard of review in affirming the summary judgment granted to Respondents.

STATEMENT

1. Sgt. Kyle Brinlee was a soldier in the Oklahoma Army National Guard who was killed in action in Iraq. Pet. App. 3a. His death and funeral were the subjects of intense media coverage, in part, because he was the first member of the Oklahoma Army National Guard killed in action since the

Korean conflict in the early 1950s. *Id.* Petitioner Robert Shower is Sgt. Brinlee's biological father.[1] Petitioner Johnny Davidson is Sgt. Brinlee's maternal grandfather and the personal representative of his estate. *Id.*

2. A funeral service was conducted for Sgt. Brinlee in his hometown of Pryor, Oklahoma, at the Pryor High School Auditorium. Pet. App. 3a-4a. Over 1,200 people attended the funeral. *Id.* Those attending included "friends, family, admirers, classmates, military personnel, acquaintances and strangers [who] filled the Pryor High School auditorium to capacity". *Id.* at 23a. At Petitioner Showler's request, Oklahoma Governor Brad Henry attended and spoke at the service. *Id.* at 4a. At the end of the service, Sgt. Brinlee's casket was moved to the back of the auditorium, in front of the main exit, and was opened for viewing by attendees as they left the auditorium. *Id.* Sgt. Brinlee's family made the decision to open the casket at the funeral, at least in part, because his "body looked fine." *Id.* at 3a. Governor Henry and hundreds of others at the funeral passed by the open casket before they exited the auditorium. *Id.* at 4a.

3. Respondent Peter Turnley is a veteran international photojournalist who, in 2004, was working on assignment for Respondent Harper's Magazine. Pet. App. 4a. At the time of Sgt. Brinlee's funeral, Turnley was working on a photo essay for Harper's concerning those grieving over deaths caused by the war in Iraq. *Id.* Turnley contacted the funeral home handling Sgt. Brinlee's funeral arrangements and asked whether the press would be allowed to attend the funeral. *Id.* Turnley was informed the press was allowed to attend, and

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1. Sgt. Brinlee was adopted by Robert Brinlee, at which time Showler's parental rights were terminated. Pet. App. 3a.

that there would be a section in the auditorium designated for the press. *Id.* Turnley, along with other members of the news media, attended the funeral. *Id.* Turnley, along with other photographers in the press section, took photographs during the funeral service. *Id.* The photographs Turnley took that day included the published photograph at issue in this case of Sgt. Brinlee's casket while it was open in the back of the auditorium, at a location immediately adjacent to the area set aside by the family for the press. *Id.* As Petitioners concede, Turnley denies he was ever told not to take pictures of the open casket.

4. A photograph of the open casket taken by Turnley, along with 19 other photographs taken by Turnley dealing with the mourning for Americans and Iraqis killed in the war, was published in the August 2004 edition of Harper's. Pet. App. 5a. The photo essay was titled: "The Bereaved, Mourning the Dead, in America and Iraq." *Id.;* Resp. App. 1a-8a.

5. In their Second Amended Complaint, Petitioners asserted seven state tort theories of recovery based upon the open casket photograph published in Harper's. Pet. App. 5a, 44a. The state tort theories of recovery asserted by Petitioners were: (1) intentional infliction of emotional distress, (2) invasion of privacy, (3) violation of 21 Okla. Stat. § 839.1 (appropriation of another's name or likeness for commercial purposes), (4) fraudulent/false misrepresentation, (5) constructive fraud, (6) unjust enrichment, and (7) negligent hiring, retention, and supervision. *Id.* at 5a, 49a, 51a, 53a, 55a, 57a, 59a, and 60a.

6. Respondents moved for summary judgment in the district court on each of Petitioners' claims for relief.

Pet. App. 81a-123a. The district court held there were no disputed issues of fact material to Petitioners' claims, and therefore summary judgment on each of Petitioners' claims was proper under Oklahoma law. Pet. App. 22a-43a. The district court further held that the First Amendment protected the publication of the photograph of the open casket because the photograph was taken at an event Petitioners opened to the public and press; the photograph depicted truthful, newsworthy information about a matter of public interest; and the photograph documented the same scene witnessed by those in attendance at the funeral. *Id.* at 25a-30a.

7. The court of appeals affirmed the district court's grant of summary judgment. Pet. App. 1a-21a. The court of appeals held that summary judgment was proper for each of the seven state law claims for relief asserted by Petitioners. *Id.* Because it affirmed the summary judgment on state law grounds, the court of appeals did not address Respondents' First Amendment defense. *Id.* at 20a.

ARGUMENT

I. The court of appeals resolved this case on state law grounds, and no federal question is presented for review.

Petitioners' Second Amended Complaint set forth seven state law claims for relief. Pet. App. 44a-64a. Petitioners invoked the jurisdiction of the federal court on the basis of diversity of citizenship under 28 U.S.C. § 1332. *Id.* at 45a. Respondents denied each of Petitioners' claims, and raised the affirmative defense that the publication of the photograph was protected by the First Amendment. Pet. App. 65a-80a.

Based upon the undisputed evidence, the district court resolved each of the seven state claims for relief against Petitioners by way of summary judgment. The court of appeals affirmed the district court on each of these state law claims, and did not reach the sole federal question in the case – Respondents' defense that the First Amendment protected the publication of the photograph. In this regard, the court of appeals stated:

> Because we conclude that summary judgment was appropriate on each of the Oklahoma state tort claims asserted by Plaintiffs in this action, we need not address the First Amendment defense asserted by Defendants in this appeal, nor do we make any statement as to the merits of that defense.

Pet. App. 20a. The court of appeals properly resolved the case on state law grounds prior to and without reaching any constitutional issues. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985).

As a result, certiorari review by this Court would necessarily involve determining whether the court of appeals properly applied Oklahoma state law. Such a quest for certiorari relief is outside the ambit of Rule 10 considerations governing review on certiorari. This Court should not exercise its judicial discretion to review a decision of the court of appeals when that decision turns solely on the application of state law.

II. *National Archives and Records Admin. v. Favish* has no application to this case.

Petitioners attempt to suggest a federal question for this Court to consider by citing *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004). *Dicta* from *Favish* was cited by Petitioners in the courts below in an attempt to support their state law claim of invasion of privacy. *See, e.g.*, Pet. App. 141a (Petitioners' response to motion for summary judgment); Pet. App. 213a (Petitioners' opening brief in the court of appeals). Both the district court and the court of appeals properly concluded that *Favish* was inapplicable to the analysis of whether Petitioners' state claim for invasion of privacy could survive summary judgment.

In *Favish*, a private citizen brought a Freedom of Information Act (FOIA) request seeking to compel the production by the federal Office of Independent Counsel of death scene photographs taken by the United States Park Police of Vince Foster, Deputy Counsel to President Clinton, who was found dead of an apparent suicide. *Favish* turned on this Court's interpretation of the language of Exemption 7(C) of FOIA, specifically whether the production of " 'records or information compiled for law enforcement purposes' . . . 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.' " *Favish*, 541 U.S. at 160 (quoting 5 U.S.C. § 522(b)(7)(C)). This Court held that "FOIA recognizes surviving family member's right to personal privacy with respect to their close relative's death scene images," and that *under FOIA* disclosure should only be denied "where the information 'could reasonably be expected to constitute an unwarranted invasion of the family's personal privacy.' " *Id.* at 170-1. Ultimately, this Court defined a balancing test between the competing interests of

personal privacy and openness of information of federal records contemplated by FOIA. *Id.* at 172-4.

The court of appeals properly held that *Favish* is inapplicable in this case because *Favish* involved a statutory privacy right under FOIA, not a state law cause of action for invasion of privacy. As the court of appeals noted, this Court observed in *Favish* that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution," citing *Favish*, 541 U.S. at 170 (which, in turn, cited *Department of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 762 (1989)). Pet. App. 10a. This Court in *Reporters Committee* stated that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution." *Reporters Committee*, 489 U.S. at 763 n.13.

Further, the court of appeals properly distinguished the *dicta* contained in *Favish* upon which Petitioners rely concerning the cultural history of burial rights of the deceased and surviving family members. The court of appeals properly noted that all of the cases cited by this Court in support of its acknowledgment that the common law has recognized a family's right to control the death images of the deceased involved death images that are gruesome, and none involved images displayed voluntarily at a public funeral. Pet. App. 11a (citing *Favish*, 541 U.S. at 168-9). Petitioners' decision to have a public funeral at the Pryor High School Auditorium, in which over 1,200 people attended and Governor Henry spoke, and their decision to open Sgt. Brinlee's casket for the public to view, at least in part because Sgt. Brinlee's body looked "just fine," is a far cry from the cases involving

gruesome death images that a family does not voluntarily choose to put on public display. As the court of appeals stated,

> [t]he photographs here are not death scene photographs, but images of Sgt. Brinlee in his military uniform that accurately depict the image seen by those who attended his funeral to pay their respects. Coupled with the public nature of this funeral, the photographs are distinguishable from those at issue in *Favish*.

Pet. App. 11a-12a. Further, both the district court and the court of appeals agreed that the Petitioners ". . . opened up the funeral scene to the public eye and can not, therefore, establish that Defendants disclosed private facts by publishing the Turnley Photo." *Id.* at 15a.

Because FOIA is not implicated here, *Favish* has no application. Further, the *dicta* contained in *Favish* upon which Petitioners rely has no application to the elements of the invasion of privacy claim brought by Petitioners under Oklahoma state law.

III. Respondents are private actors, and therefore Petitioners' citation of *Roe v. Wade* and other constitutional "right of privacy" cases has no application.

Petitioners further attempt to find a federal question for this Court to consider by citing *Roe v. Wade*, 410 U.S. 113 (1973), and other decisions of this Court for the proposition that "[t]his Court 'has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.' " Pet. 8 (quoting *Roe v.*

Wade, 410 U.S. at 152). A fundamental flaw in Petitioners' analysis is that the right of privacy articulated by *Roe* and the other cases relied upon by Petitioners is rooted in the United States Constitution, and is articulated in response to offending *state* action. Indeed, each of the cases relied upon by Petitioners concerns the constitutionality of a state statute or the conduct of a state actor.[2]

"As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.' " *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)). Petitioners' claims in this case are against purely private actors and involve purely private conduct. Consequently, a constitutional right of privacy suggested by Petitioners is inapplicable in this case.

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2. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (constitutionality of Texas criminal abortion statute); *Carey v. Population Services International*, 431 U.S. 678 (1977) (constitutionality of New York statute concerning distribution of contraceptives); *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006) (constitutionality of Kansas statute requiring professionals to notify state of suspected injury to minor resulting from sexual abuse); *Livsey v. Salt Lake County*, 275 F.3d 952 (10th Cir. 2001) (action against county and county police officer); *Hill v. National Collegiate Athletic Assoc.*, 865 P.2d 633 (Cal. 1994) (action challenging intercollegiate athletic association's drug testing program as violative of the privacy initiative of the California state constitution); *Phelps-Roper v. Taft*, 2007 WL 915109 (N.D. Ohio. 2007) (constitutionality of Ohio's statute regarding picketing or protesting during funeral services); *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006) (constitutionality of Kentucky statute prohibiting picketing and protesting at funerals).

IV. The court of appeals applied the appropriate standard of review in affirming the summary judgment granted to Respondents.

Petitioners also argue that the court of appeals failed to apply the proper standard of review in affirming the summary judgment granted to Respondents. This argument does not have merit.

First, the court of appeals properly reviewed the grant of summary judgment *de novo*, applying the same legal standard as the district court. Pet. App. 6a. *See Mountain West Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 470 F.3d 947, 950 (10th Cir. 2006).

Second, the court of appeals properly stated that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," citing Fed. R. Civ. P. 56(c) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Third, the court of appeals properly recognized that when reviewing the underlying facts of the case, "all inferences must be viewed in the light most favorable to the non-moving party and that it may not make credibility determinations or weigh the evidence," citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

Thus, the court of appeals analyzed the district court's grant of summary judgment under the appropriate standard of review and rules of law.

What Petitioners really contend is that the court of appeals misapplied Oklahoma state law with respect to their claims for invasion of privacy and fraud. However, as noted in Rule 10 of this Court's rules, a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. In any event, the court of appeals did not misapply Oklahoma law and Petitioners offer nothing to indicate that it did.

First, with respect to invasion of privacy, the court of appeals properly noted that Petitioners asserted three of the four branches of the state tort of invasion of privacy: (1) appropriation, (2) publication of private facts, and (3) intrusion upon seclusion. Pet. App. 10a. Tellingly, Petitioners wholly fail in their petition to state the elements of each of the state privacy torts considered by the court of appeals. The court of appeals carefully and methodically addressed each of the elements of each of the state privacy torts, Pet. App. 10a-17a, and Petitioners do not claim that the court misstated Oklahoma state law.

Second, with respect to fraud, the court of appeals properly set forth the elements of fraud under Oklahoma law, the same elements set forth by Petitioners in their petition. Compare Pet. App. 17a with Pet. 25. Oklahoma law further requires that when a false representation is the basis of fraud, that representation must relate to existing facts or previously existing facts, and not to promises of future acts. *Roberts v. Wells Fargo AG Credit Corp.*, 990 F.2d 1169, 1172 (10th Cir. 1993). An exception to this rule exists where a promise to act in the future is made with the intention not to perform and with the intent to deceive. *Id.* Petitioners claim Turnley told the funeral home director he would not take pictures of

the open casket, and therefore they are attempting to come within the exception. However, as the court of appeals correctly held, there was *no* evidence presented by Petitioners of Turnley's intent at the time he spoke with the funeral home director prior to the funeral. Therefore, Petitioners could not bring themselves within the exception and summary judgment was proper.

Further, Petitioners' argument that Turnley's intent may be proved by circumstantial evidence was never raised by Petitioners in the courts below. *See* Pet. App. 155a-158a (Petitioners' response to motion for summary judgment addressing fraud claim, which focused on reliance by Petitioners on the alleged promise made by Turnley to the funeral home representative); Pet. App. 210a-213a (Petitioners' opening brief in court of appeals, which focused on agency and whether Petitioners could rely on a promise made to their agent). Arguments not raised in the trial court or the court of appeals cannot be raised for the first time in a petition for writ of certiorari to this Court.

The court of appeals applied the appropriate standard of review, applied the proper state rules of law, and correctly affirmed the district court's grant of summary judgment to Respondents.

CONCLUSION

Because the court of appeals resolved this case on state law grounds alone and no federal question is presented for review, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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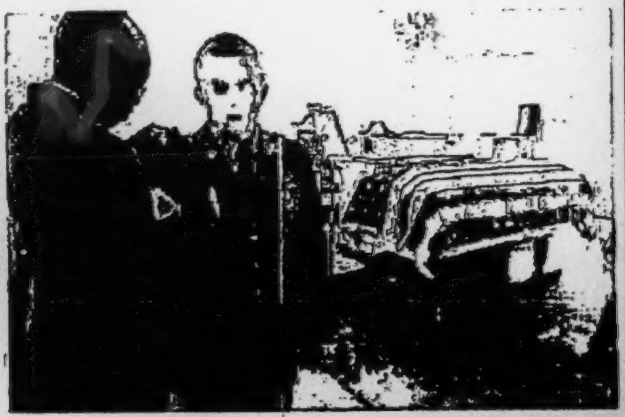
THE BEREAVED

Mourning the dead, in America and Iraq

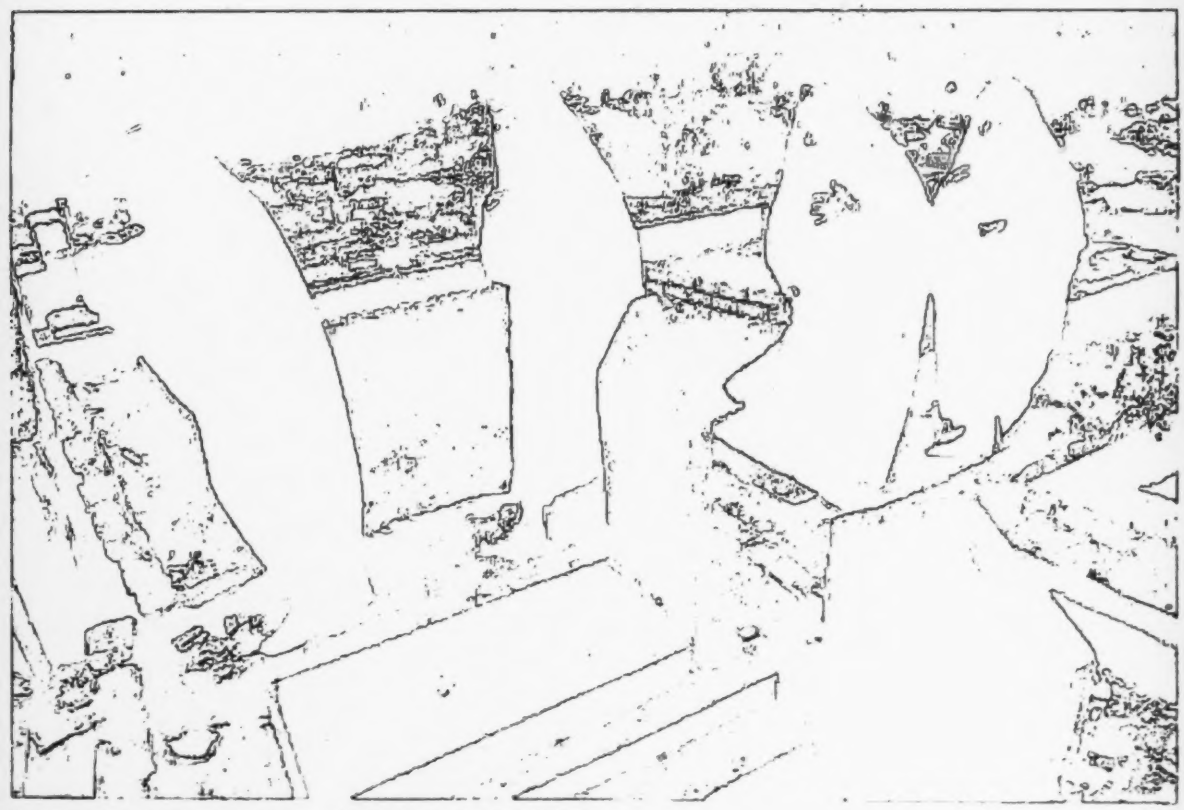
By Peter Turnley



The body of Iraqi soldier Samih-Safeq, twenty, is exhumed for proper burial, Baghdad, April 14, 2003.
Members of a military honor guard prepare for the funeral of Army Staff Sgt. Esau G. Patterson Jr., twenty-five, killed in Baghdad by a car bomb on April 29, 2004.
Relatives of Saddam Mohammed Haidar, twenty-nine, carry his body through the outskirts of Baghdad, May 13, 2003.
The parents of Staff Sgt. Patterson at his funeral in Ridgeland, S.C., May 10, 2004.

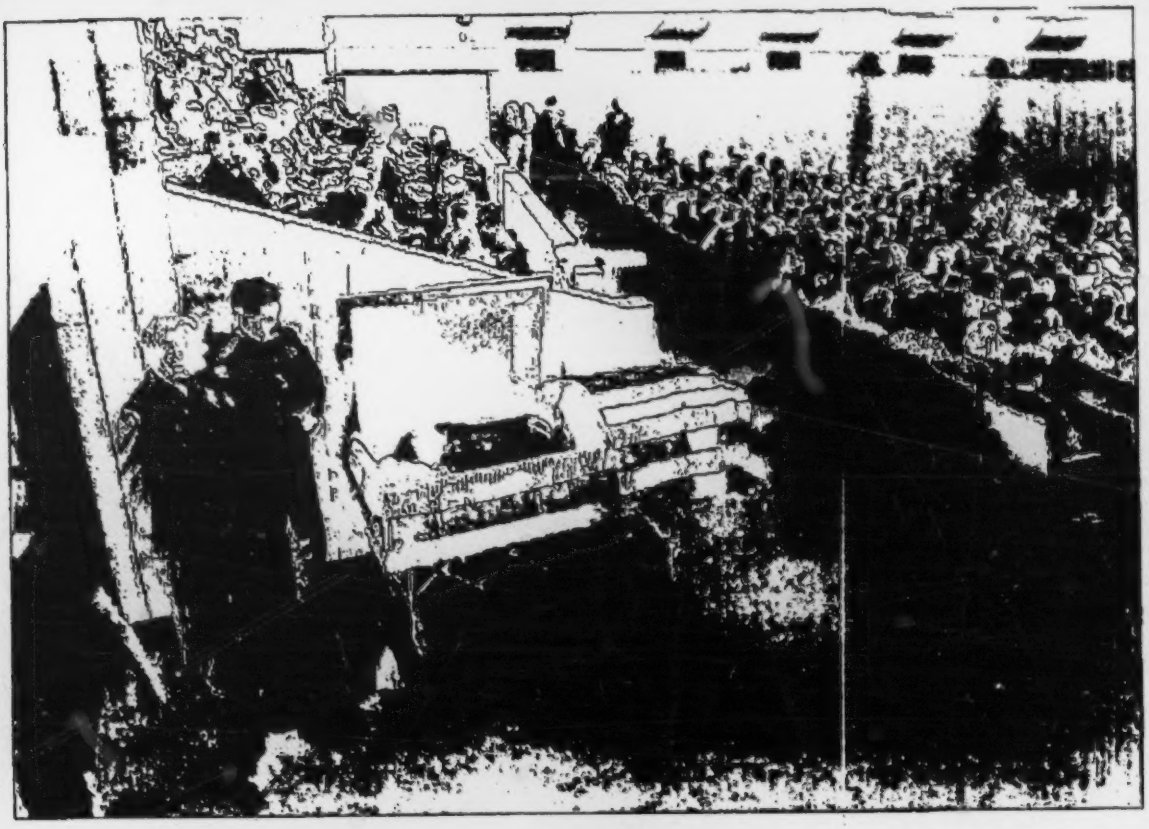
Harper's Magazine contributing editor Peter Turnley is a photographer based in Paris and New York City. He has published four books of photographs, including Moments of Revolution, Parisians, *and* In Times of War and Peace.

The funeral of Staff Sgt. Patterson.
Funeral services in Pryor, Okla., for Army Spc. Kyle A. Brinlee, twenty-one, killed when his convoy struck an improvised explosive device in Al-Asad, Iraq, on May 11, 2004.

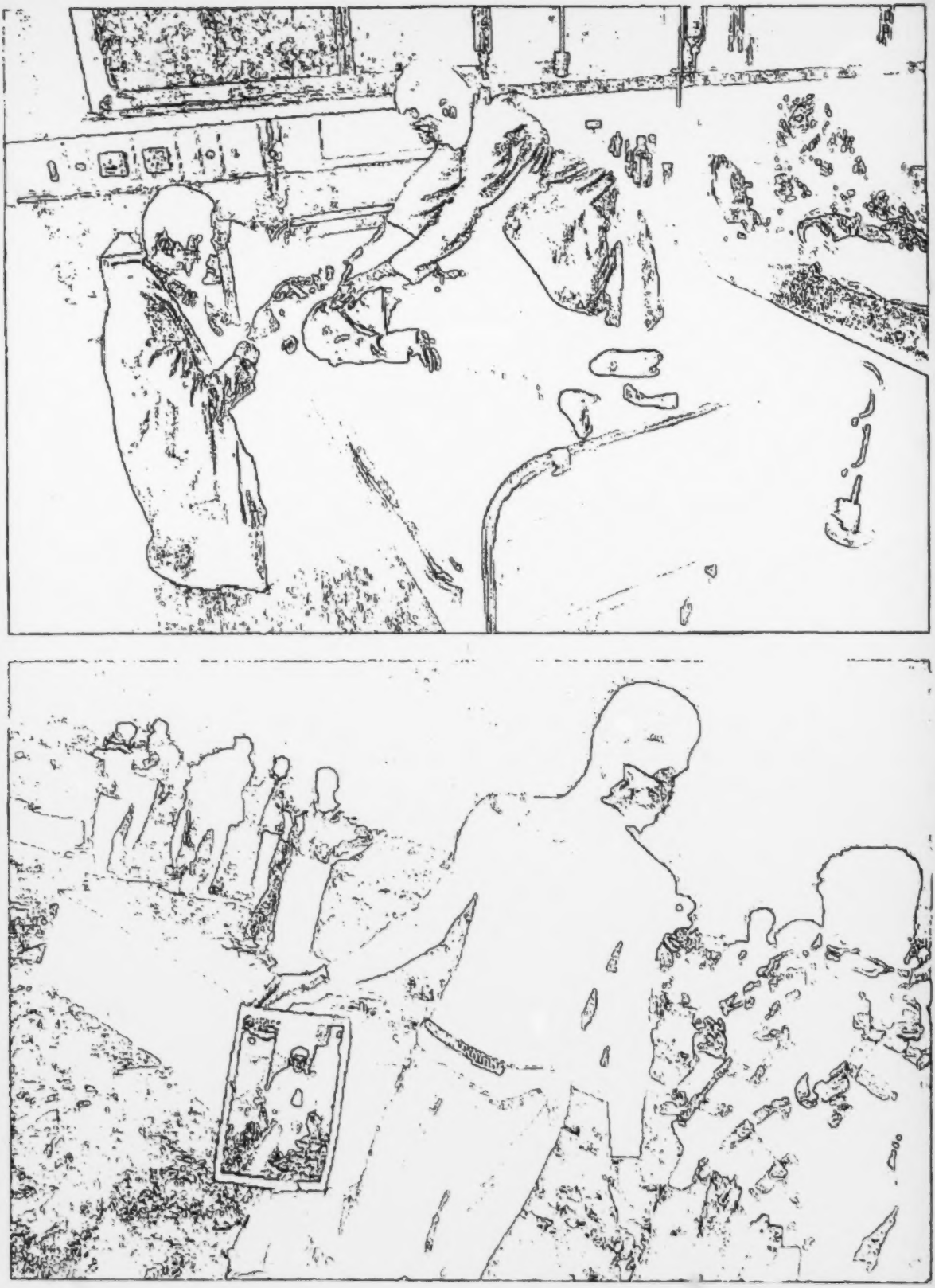


Iraqis pass by a corpse on a side street in Baghdad, April 13, 2003.
At the burial of Abedal Hassn, fifty-three. Baghdad, April 15, 2003.

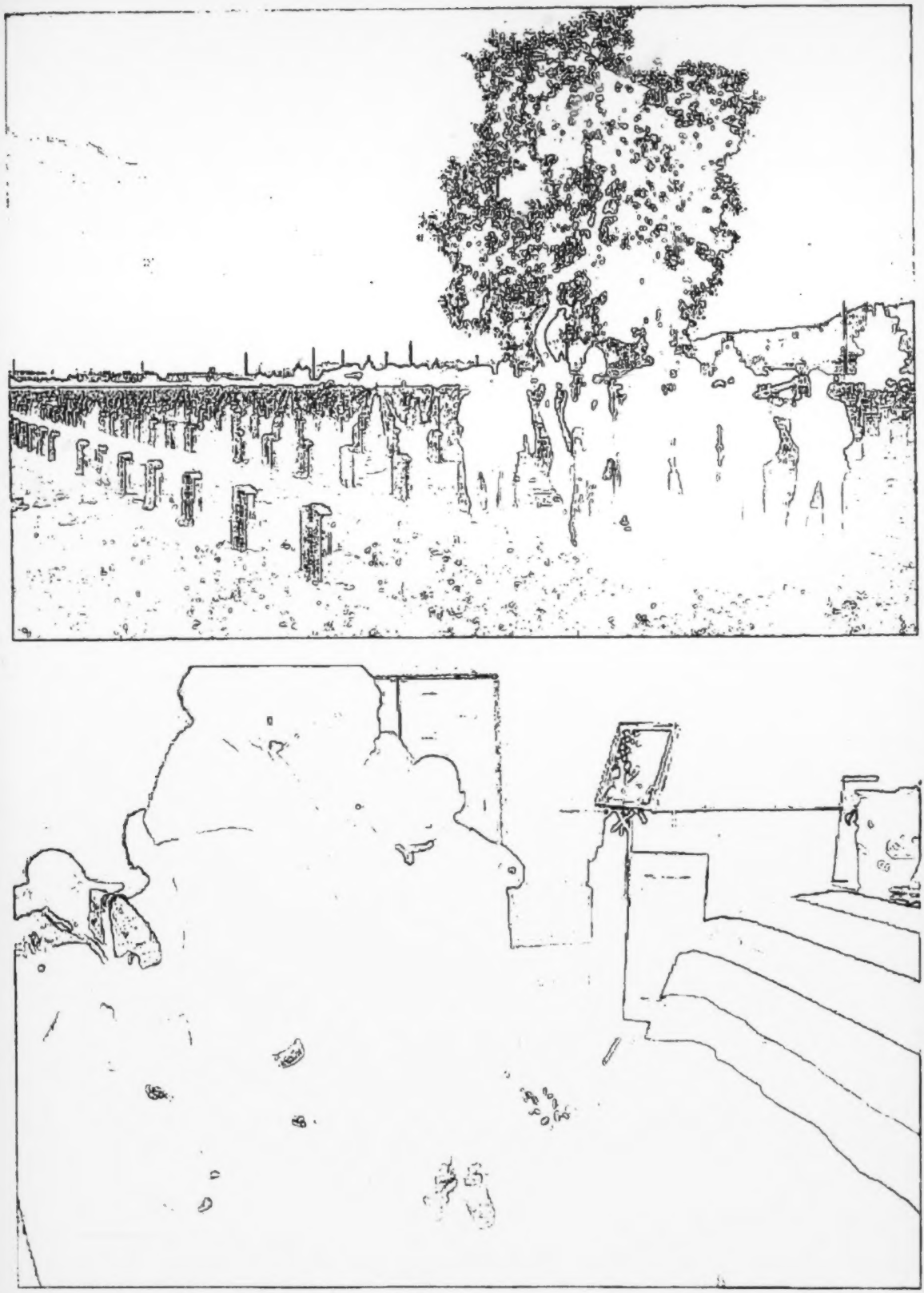
Bodies of Iraqi fighters at a hospital morgue, Basra, April 8, 2003.
A relative at the wake for Staff Sgt. Patterson.



The casket of Spc. Brinlee at funeral services in a high school auditorium in Pryor, Okla.
At the grave of Abedal Hassn, Baghdad.



Doctors are unable to save Worood Nasiaf, ten, Baghdad, April 14, 2003.
Friends and relatives bury an Iraqi soldier killed on the outskirts of Baghdad, May 14, 2003.



Family members at the El Paso, Tex., funeral of Army Spc. Isela Rubalcava, twenty-five, killed in Mosul, Iraq, on May 8, 2004. Relatives at the wake for Staff Sgt. Patterson.

Friends and relatives arrive to claim the body of an Iraqi fighter, Basra, April 3, 2003 (top left).
Outside the funeral services for Spc. Brinlee (top right, bottom left).
Grieving family members prepare to bury a relative killed in the war, Baghdad, April 15, 2003 (bottom right).